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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 87

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

PETITION FOR CERTIORARI FILED MAY 13, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,203)

(34,203)

SUPREME COURT OF THE UNITED STATES

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No. 894

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[fol. 5] **IN CIRCUIT COURT OF JACKSON COUNTY**

GUERNEY O. BURTCH

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY

COMPLAINT FOR PERSONAL INJURIES—Filed Feb. 20, 1918

Demand $30,000

Par. 1. The plaintiff, Guerney O. Burtch, complaint of defendant. The Baltimore and Ohio Southwestern Railroad Company, and says,—that on the 24th day of October, 1917, defendant was, has since been, and still is, a corporation, duly organized under the laws of the State of Indiana, and engaged in operating a steam railroad in said State and in and through Jackson, Jennings and other counties therein, and during all said time had in its employ and engaged in its said business more than five persons; that the town of Commiskey in said County of Jennings was on the date first named a station on the line of defendant's said railroad, where it maintained a depot and platform on the West side of its maintrack and a side track East of the Main track and a stub switch or loading track East of said side track; that on said date a local freight train, operated by defendant, and in charge of one Ed Jackson, who was then and there in defendant's employ as conductor, arrived at said station, carrying a machine known as an ensilage cutter, which defendant had theretofore received to be transported by it to said station and delivered to certain consignees; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it was transported, and that said machine was very heavy, and with its crating and attachments weighed about 2,000 pounds; that defendant had in its employ upon said train three other persons as brakemen, and no more, whose duty it was to assist said Jackson in the handling of freight, and said conductor and brake-

[fol. 6] men were unable to unload said machine safely by reason of its great weight, and defendant had carelessly and negligently failed and omitted to provide and furnish a force of men sufficient to unload the same, and because of that fact an emergency arose and then and there existed for the employment of additional help to unload said machine; that thereupon said Jackson as such conductor acting in line of his duty and for and on behalf of defendant requested plaintiff to assist in unloading said machine, and under the circumstances aforesaid and in obedience to said request and not otherwise, plaintiff accepted said employment and undertook to assist in said work; that defendant should and could have furnished and supplied strong, safe and suitable skids and appliances for unloading said machine, but it carelessly and negligently failed to furnish any appliances for such use; that said machine could safely and should have been unloaded upon the platform from said train while standing upon the main track, but defendant carelessly and negligently failed so to unload the same; that said machine could have been safely unloaded upon the ground to the East by placing the car in which it was transported upon said stub switch, but defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on said track, and its said conductor in charge of said work caused two green planks 10 or 12 feet in length to be brought from a nearby saw-mill, and by means of said plank, which was defective weak and of insufficient strength, carelessly and negligently undertook to unload said machine from said car while on said side track over the tracks of said stub switch eastward to the ground beyond, and carelessly and negligently failed to inspect, test or support said plank, but negligently pronounced the same sufficient and carelessly and negligently ordered and directed said machine to be unloaded and moved from said car upon said plank, and while said machine was being so unloaded and while plaintiff was assisting in said work as [fol. 7] aforesaid and in the exercise of due care, one of said planks broke and said machine fell upon plaintiff and crushed his body to the ground breaking three ribs on his left side and injuring his spine and spinal cord, and bruising and injuring his flesh, muscles and nerves, whereby both his legs, his bowels and bladder and the muscles and

nerves of the lower part of his body were and are permanently paralyzed, and he was made sore and sick, and from his said injuries he suffered, still suffers, and in future will suffer, great physical pain and mental anguish, and he was compelled to and did incur expense in the sum of $200 for care, nursing, medicines and medical aid, in attempts to heal and cure said injuries, and in future will be required to expend large sums of money for such purposes; that he is a farmer, 31 years of age, married, and has a wife and two children, and before receiving said injuries he was sound in body and in good health, and was able to work and earn money and support himself and family, but because of said injuries he has been confined to his home and bed and unable to work for four months, and rendered permanently unable to perform manual labor and a dependent cripple and unable to care for himself or to relieve the demands of nature without aid,—all to his damage in the sum of Thirty Thousand Dollars.

That his said injuries and damages were caused solely by and the direct result of, the carelessness, negligence and omissions of duty of said defendants and its said conductor as aforesaid, and inflicted upon plaintiff while in the exercise of due care on his part.

Par. 11. The plaintiff, Guerney O. Burtch, complains of defendant, The Baltimore and Ohio Southwestern Railroad Company, and for second paragraph of complaint herein says, that on the 24th day of October, 1917, defendant was, has since been and still is, a corporation, duly organized under the laws of the State of Indiana, and en-
[fol. 8] gaged in operating a steam railroad in said state and extending through Jackson, Jennings and other counties therein; that the town of Commiskey in said Jennings County was a station on the line of defendant's said railroad on the date first named, where it maintained a Depot on the West side of its main track, and a side track East of the main track, and a stub switch or loading track East of said track; that on said date a local freight train, operated by defendant, and in charge of one Ed Jackson, who was then and there in defendant's employ as conductor, arrived at said station carrying a machine known as an ensilage cutter, which defendant had theretofore received for transportation to and delivery at said station; that plain-

tiff and six of his neighbors had bought said machine, and he was present upon the arrival of said train to receive said machine, and had arranged to use the same upon his farm the following day; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it had been transported, and said machine was very heavy, and with its crating and attachments weighed about 2,000 pounds; that defendant had in its employ upon said train besides said conductor, three brakemen, and no more, whose duty it was to assist said conductor in handling freight, and by reason of its great weight said conductor and brakemen were unable to unload said machine, and defendant had carelessly and negligently failed to provide and furnish a force sufficient to handle and unload said machine in safety; and that defendant could and should have furnished strong, safe and suitable skids and appliances for unloading said machine, but it had carelessly and negligently failed and omitted to furnish any appliances for such purposes; that said machine could safely and should have been unloaded upon the platform from said train while standing upon the main track, but defendant carelessly and negligently failed and neglected so to unload the same; that said machine could [fol. 9] have been safely unloaded upon the ground to the East by placing the car in which it had been carried upon said stub switch, but defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on its said side track, and its said conductor in charge of said work caused two green planks to be brought from a nearby saw-mill, and by means of said planks, which were weak and defective and of insufficient strength to, support said machine, carelessly and negligently undertook to unload said machine from said car while on said side track over the rails of said stub switch eastward to the ground, and carelessly and negligently failed to inspect, test or support said plank, but carelessly pronounced the same safe and sufficient, and carelessly and negligently ordered and directed said machine to be unloaded and moved upon said plank and thence to the ground; that in these circumstances, and because of his interest in said machine plaintiff at the request of and with the knowledge and consent of said conductor went upon the right of

way of defendant and undertook to assist in unloading said machine and while engaged in said work, and in the exercise of due care for his safety, one of said planks broke under the weight of said machine and said machine fell upon him and crushed his body to the ground, breaking three ribs on his left side, and injuring his spine and spinal cord, and bruising and injuring his flesh, muscles and nerves, whereby both his legs, his bowels and bladder, and the nerves and muscles of the lower part of his body were and are permanently paralyzed, and he was made sore and sick, and suffered and still suffers, and in the future will suffer, great physical pain and mental anguish, and he was compelled to and did incur expense in the sum of $200 for care, nursing, medicines, and medical aid in attempts to heal and cure his said injuries, and will be required in the future to expend large sums for such purposes; that he is a farmer of 31 years of age, married, and has a wife and two [fol. 10] children, and before receiving said injuries he was sound in body and in good health, and able to work and earn money and support himself and family, but because of said injuries he has been confined to his home and bed for four months and unable to work, and rendered permanently unable to perform manual labor and a dependent cripple, and unable to care for himself and to relieve the demands of nature without aid,—all to his damage in the sum of Thirty Thousand Dollars.

That his said injuries and damages were caused solely by and are the direct result of, the carelessness and negligence and omission of duty of said defendant, and its said conductor as above alleged, and were inflicted upon plaintiff while in the exercise of due care on his part.

Wherefore plaintiff demands Judgment against defendant for Thirty Thousand Dollars, and for all other proper relief.

Montgomery & Montgomery, Attorneys for Plaintiff.

Appearances of counsel omitted in printing.

In Circuit Court of Jackson County

[Title omitted]

[fol. 11] Motion to Separate Causes of Action—Filed March 6, 1918

The defendant in the above entitled cause moves the Court for an order requiring the plaintiff therein to separate the several causes of action set forth in his complaint herein and each paragraph thereof into separate paragraphs and separately number the same.

Kochenour & Prince, and McMullen & McMullen, Attorneys for Defendant.

In Circuit Court of Jackson County

[Title omitted]

Order Overruling Motion to Separate—Mar. 8, 1918

Come now the parties and the court being sufficiently advised in the premises overruled defendant's motion to require plaintiff to separate his complaint into separate causes of action herein, to which ruling of the court, the defendant at the time excepts.

[fol. 12] In Circuit Court of Jackson County

[Title omitted]

Motion to Make Complaint More Specific—Filed Mar. 11, 1918

The defendant in the above entitled cause moves the court for an order requiring the plaintiff therein to make his complaint and each paragraph thereof more specific, definite and certain on each of the following particulars, towit:

1. To state whether the shipment of said ensilage cutter constituted a car load or less than car load lots.
2. To state what notice, if any, plaintiff had of the arrival of said ensilage cutter.
3. To state whether said ensilage cutter was shipped from without this state to said town of Commiskey or from a point within this state to said town.
4. To state whether said shipment was made by contract in writing or in parol.
5. If said shipment was made to this plaintiff or to him and others under a contract in writing set forth said contract or copy thereof.
6. To give the number of men defendant furnished to unload said ensilage cutter.
7. To state how or in what manner and means said conductor caused said two green planks to be brought from said saw mill.

McMullen & McMullen, Kochenour & Prince, Attorneys for Defendant.

[fol. 13] In Circuit Court of Jackson County

[Title omitted]

Order Overruling Motion to Make More Specific—Mar. 13, 1918

Come now the parties and the court being sufficiently advised in the premises now overrules defendant's motion to require plaintiff to make his complaint more specific, to which ruling of the court, the defendant, at the time excepts.

In Circuit Court of Jackson County

[Title omitted]

Demurrer to Complaint—Filed Mar. 14, 1918

The defendant in the above entitled cause demurs to the first and second paragraphs of plaintiff's complaint and

separately and severally to each of said paragraphs and for cause of demurrer says that said paragraphs nor neither of them state facts sufficient to constitute a cause of action.

Defendant sets out his memorandum of points on demurrer.

Kochenour & Prince, McMullen & McMullen, Attorneys for Defendant.

[fol. 14] Memoranda.

1. Neither paragraph shows and negligence of the defendant which is approximately the cause of the alleged injury.

2. Neither paragraph shows any authority on part of the conductor to employ, order or direct the plaintiff as alleged in the complaint.

3. Neither paragraph shows facts which show it to be within the line of duty of the conductor to employ, order or direct the plaintiff as alleged in his complaint to do the acts alleged to do in his complaint.

4. Neither paragraph shows that the ensilage cutter was an interstate shipment and said shipment was therefore governed by the Federal Act and the presumption of law is that it was shipped by virtue of a written contract and no contract or copy is set out or attached to said complaint.

5. Neither paragraph shows that the shipment was an Interstate shipment and is therefore governed by the Federal Act and under such conditions the law is that the complaint should show that the plaintiff did not assume the risk which he fails to do.

6. The complaint and each paragraph thereof shows that the plaintiff assumed the risk and cannot recover.

7. Each paragraph shows this to be an Interstate shipment governed by the classifications, tariffs and rules filed with the Interstate Commerce Commission and accepted by it as well as a like Commission of the State of Indiana, said regulations, rules and tariff providing that shipments of the kind mentioned in the complaint must be unloaded by the consignee of which fact the law presumes the plaintiff had notice and there is no allegation of non notice of such rules, regulations and tariffs and especially of the Special part thereof herein mentioned.

8. Each paragraph shows that the plaintiff knew or could by the exercise of reasonable care have known of the al-
[fol. 15] leged defect in said timbers mentioned in said complaint.

9. Each paragraph fails to show that plaintiff did not assume the risk of injury by using said planks or timbers.

10. Neither paragraph shows that the plaintiff was free from contributory negligence.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER—Mar. 18, 1918

Come now the parties and the court being sufficiently advised in the premises, overrules demurrer to each paragraph of plaintiff's complaint herein, to which ruling of the court the defendant at the time separately and severally except.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

INTERROGATORIES TO DEFENDANT—Filed Mar. 25, 1918

The plaintiff submits and moves the court to require defendant through its proper officer or agent to answer under oath each of the following interrogatories from 1 to 4 inclusive, towit:

[fol. 16] No. 1. Was defendant, The Baltimore and Ohio Southwestern Railroad Company, on October 24th, 1917, engaged in operating a steam railroad extending through the town of Commiskey in Jennings County, Indiana?

Answer. ——.

No. 2. Did defendant on October 24th, 1917, have in its employ and engaged in operating a railroad in this state more than five persons?

Answer. ——.

No. 3. Was one Ed Jackson, on October 24th, 1917, in defendant's employ as a train conductor?

Answer. ——.

No. 4. Was said Ed Jackson as conductor in charge of a local freight train operated by defendant through the town of Commiskey, Indiana, on October 24th, 1917?

Answer. ——.

Montgomery & Montgomery, Attorneys for Plaintiff.

and the defendant is ruled to answer said interrogatories.

And now by agreement of parties examination of plaintiff is ordered to be taken at the office of Montgomery & Montgomery at Seymour, Indiana, at one thirty P. M., March 30, 1918.

In Circuit Court of Jackson County

[Title omitted]

Answer

First Paragraph

The defendant in the above entitled cause for answer to [fol. 17] the plaintiff's complaint herein says it denies each and every allegation therein made.

Second Paragraph

For further and second paragraph of answer to plaintiff's complaint herein and each paragraph thereof the defendant says:

That the plaintiff was one of a number of persons, owners and consignees of an ensilage cutter described in the complaint herein, which had been shipped from Louisville, Kentucky to Commiskey, Indiana, a station on the line of the defendant's railroad, arriving at said last named station on the day of the injury to plaintiff as alleged in the complaint herein.

That said shipment was made between said stations over the line of defendant, on a train of defendant running between said cities and points.

That said ensilage cutter was received and shipped by defendant under and in accordance with the usual written

contract in force at said time of which plaintiff had and has full knowledge.

That said ensilage cutter was carried by the defendant at less than car load ratings and was very heavy so that the same could not have been handled by the regular station and train employees and said Commiskey was a station where the unloading facilities of defendant were insufficient for handling said cutter.

That there was in force and effect on said date and long prior thereto a rule and regulation of said defendant, theretofore filed with the Indiana Public Service Commission and the Interstate Commerce Commission, providing that such freight as described in plaintiff's complaint and herein, should be unloaded by the owner or owners thereof, including this plaintiff.

That said rule and regulation was in full force and effect at the time of plaintiff's injury and of which plaintiff had full notice. That full compliance with the law requiring [fol. 18] the giving of such notice had been rendered by defendant prior to said injury.

That said rule and regulation has at no time been invalidated, overruled or questioned by this plaintiff or any other person.

That said Conductor mentioned in plaintiff's complaint had no authority or right to employ plaintiff in assisting to unload said ensilage cutter or to in any manner or degree bind the defendant by any such alleged employment.

That the plank or skid mentioned in the complaint herein was not the property of nor selected by the defendant or its employees but was selected by the owners of said ensilage cutter, including this plaintiff and—the defendant nor its employees knew of any means of such knowledge but that the plaintiff did know of such defect and had full means of knowing of the same.

That said skids, including the one alleged to be defective, was not the property of nor furnished by defendant but by the plaintiff.

Wherefore defendant prays judgment for costs and all proper relief.

Kochenour & Prince, McMullen & McMullen, Attorneys for Defendant.

and the plaintiff is ruled to reply to second paragraph of said answer.

In Circuit Court of Jackson County

[Title omitted]

[fol. 19] Demurrer to Answer

The plaintiff demurrs to the 2nd paragraph of defendant's answer herein and for cause of demurrer says that said paragraph of answer does not contain facts sufficient to constitute a cause of defense, for reasons more particularly set out in a memorandum filed herewith as a part hereof.

Montgomery & Montgomery, Att'ys for Plaintiff.

Memorandum

1. No copy of the alleged rule of defendant is set out with said paragraph of answer.

2. Said answer is a mere argumentative denial, when a general denial on file.

3. Said paragraph does not deny all the material matters in the complaint or all the acts of negligence charged.

4. All facts pleaded in said answer are admissible under the general denial filed as the 1st paragraph of answer.

In Circuit Court of Jackson County

[Title omitted]

Order Sustaining Demurrer to Answer

Come now the parties and the Court being sufficiently advised in the premises now sustains plaintiff's demurrer to the second paragraph of defendant's answer, to which ruling of the Court defandant at the time excepts.

[fol. 20] IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

March 30, 1918

This cause is now set for trial May 27th, 1918.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

ANSWERS TO INTERROGATORIES—Filed May 9, 1918

In answer to the interrogatories submitted by the plaintiff, filed March 25, 1918, defendant says:

Answer No. 1. Yes.
Answer No. 2. Yes.
Answer No. 3. Yes.
Answer No. 4. Yes.

(Signed) F. B. Mitchell, General Superintendent of the Baltimore and Ohio Southwestern Railroad Company.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

MINUTE ENTRIES OF TRIAL—May 27, 1918.

Come now the parties and the examination of the plain-
[fol. 21] tiff is now published in open Court, and reads as follows: (here insert). And now this cause being at issue is called for trial, and the plaintiff demands a jury, and at the call of the Sheriff of Jackson County, Indiana, comes Allan Lucas, John Summa, James B. Cross, George Hurley, Charles T. Reinbold, Clarence Eastin, John T. Kieffer, Worth Clark, Sherman Cockerham, Kirby Smith, George Darlage and James Luckey, twelve good and lawful jurors of Jackson County, Indiana, selected by the parties and who are sworn as to their qualifications, empaneled and sworn to try this cause according to the law and the evi-

dence, and the Jury having heard the opening statement of the counsel herein, and hearing a part of the evidence to be adduced, and there not being time to finish said cause the further hearing thereof is now continued until tomorrow morning at 9 o'clock.

[Title omitted]

May 28, 1918.

Comes now the parties and the trial of this cause is now resumed with the Jury as of yesterday, and the Jury having heard all the evidence to be adduced, and heard the argument of counsel, and receiving the written instructions of the Court, the jury now retires to the Jury Room under charge of its sworn bailiff, to consider of its verdict; and the Clerk of this Court files said written instructions so given by the Court. The Court at the request of the defendant submits interrogatories numbered from 1 to 39 inclusive, to be answered by the Jury, and to be returned by them, with their verdict herein.

Comes now said Jury under charge of its sworn bailiff and return into open Court, its verdict, together with their [fol. 22] answer to said interrogatories, which verdict and interrogatories and answers thereto reads as follows:

In Circuit Court of Jackson County

Guerney O. Burtch

vs.

The Baltimore and Ohio Southwestern Railroad Company

Verdict and Answers to Interrogatories

We, the Jury find for the plaintiff, Guerney O. Burtch and assess his damages at $8,000.00.

Kirby Smith, Foreman.

One. Was Guerney O. Burtch, and others the owners of the ensilage cutter mentioned in the complaint at the time said Burtch received his alleged injuries?

Answer. No. Kirby Smith.

Two. Did plaintiff on the day he received his alleged injuries wait at the station for the arrival of the train upon which said ensilage cutter was shipped?

Answer. No evidence. K. Smith.

Three. Did plaintiff know said ensilage cutter was upon said train before said train arrived?

Answer. Yes. Kirby Smith.

Four. What was the date of plaintiff's alleged injury?

Answer. Oct. 27th, 1917. Kirby Smith.

Five. Did plaintiff on said date assist in unloading other freight from the same car in which said cutter was before was attempted to be removed therefrom?

Answer. No evidence. Kirby Smith.

Six. Did plaintiff on the day he was injured as alleged assist in unloading at the station of Commiskey other freight from the same car in which said cutter was before said cutter was attempted to be removed therefrom?

[fol. 23] Answer. No evidence. Kirby Smith.

Seven. Was the car from which the ensilage was attempted to be removed a way car, that is one which contained other freight for other points than said Commiskey?

Answer. Yes. Kirby Smith.

Eight. Did said car come in said train from Louisville, Kentucky, to Commiskey?

Train came from Louisville, no evidence from where car came from. Kirby Smith.

Did said Cutter come to said Commiskey in said car from Louisville, Kentucky?

Answer. No evidence. Kirby Smith.

Nine. Is said Commiskey in the State of Indiana?

Answer. Yes. K. Smith.

Ten. Was there in full force and effect at the time of plaintiff's alleged injury, an official classification of rates, rules, regulations and tariffs?

Answer. Yes. Kirby Smith.

Eleven. Was the official classification of rates, rules, tariffs and regulations that was in force and effect on the road of defendant at the time plaintiff's alleged injury known as official classification No. 44?

Answer. Yes. Kirby Smith.

Twelve. Had said "Official No. 44" been filed with the Public Service Commission of Indiana on December 14th, 1916?

Answer. Yes. Kirby Smith.

Thirteen. Had said Official Classification No. 44 been filed with the Interstate Commerce Commission on December 12th, 1916?

Answer. Yes. Kirby Smith.

Fourteen. Was there not in full force and effect at the time plaintiff was injured and it being one of the rules and regulations included in said Official Classification No. 44 [fol. 24] on page 30 thereof the following viz: Owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings that cannot be handled by regular station employees, or at stations where the carriers loading or unloading facilities are not sufficient for handling?

Answer. Yes. Kirby Smith.

15. Do not the letters quoted above "L. C. L." stand for the words less than car load lots?

Answer. Yes, Kirby Smith.

16. In unloading said cutter from said car were timbers used?

Answer. Yes. Kirby Smith.

17. Were said timbers secured by plaintiff and another person from a nearby saw mill?

Answer. Yes. Kirby Smith.

18. Who selected said timbers?

Answer. Conductor. Kirby Smith.

19. Were said timbers apparently sound and safe?

Answer. No evidence. Kirby Smith.

20. In unloading said cutter did one of said timbers break allowing said cutter to fall upon plaintiff?

Answer. Yes. Kirby Smith.

21. What part of the distance from said car had said cutter been moved toward the ground when said timber broke?

Answer. About two-thirds. Kirby Smith.

22. Who were present when said timbers were selected?

Answer. Plaintiff, Conductor Jackson and others. Kirby Smith.

23. Was there a defect in said timber which a careful inspection by those selecting the same could not have discovered?

Answer. No evidence. Kirby Smith.

24. Was the defect in said plank or timber what caused the same break and injure plaintiff?

Answer. No evidence. Kirby Smith.

25. Did said timbers appear to a reasonably prudent man safe and suitable for the unloading of said timbers?

Answer. Suitable to employee but not sufficiently tested [fol. 25] by employer.

26. Was said cutter heavy?

Answer. Yes. Kirby Smith.

27. Did plaintiff know said cutter was heavy while the same was yet in said car?

Answer. Yes. Kirby Smith.

28. What was the size of said timbers so selected or secured by plaintiff and another?

Answer. Approximately, 2x6x12 Ft. Kirby Smith.

29. Were they freshly sawed timbers?

Answer. Yes. Kirby Smith.

30. Was said cutter moved by crow bars and rollers from within said car to said car door and there placed on said timbers?

Answer. Yes. Kirby Smith.

31. Was plaintiff assisting the train crew and others in moving said cutter down said timbers when he was injured?

Answer. Yes. Kirby Smith.

33. How much did said cutter weigh?

Answer. About 1,600 lbs. Kirby Smith.

34. Where were the Conductor of said train and the train crew when plaintiff and another were gone after said timber?

Answer. At the car. Kirby Smith.

35. Did the Conductor or any member of the train crew assist in any manner in selecting said timbers?

Answer. Conductor selected said timber. Kirby Smith.

36. If you answer the last question yes, then state in what way or manner the Conductor or any member of the train crew assisted in selecting said timbers?

Answer. By testing the timber with his weight. Kirby Smith.

37. Was plaintiff an employee of defendant at the time he was injured?

Answer. Yes.

[fol. 26] 38. If plaintiff was an employee by whom and when was he employed?

Answer. Oct. 24, 1917. By Conductor Jackson. Kirby Smith.

39. Did not plaintiff have an opportunity to see, examine and know of the condition of said timbers as the defendant or any of its employees?

Answer. Yes. Kirby Smith.

And the Court having seen and inspected said verdict and interrogatories and answers thereto, orders the Clerk of this Court to file the same, and now the Clerk of this Court files the same as ordered.

In the Circuit Court of Jackson County

[Title omitted]

Motion for Interrogatories to Jury

The defendant in the above entitled cause moves the Court to require the jury trying the same to answer each of the following interrogatories and return the said interrogatories and answers thereto into open Court with their general verdict in case they find a general verdict: said interrogatories being numbered respectively from One to 39.

Kochenour & Prince, McMullen & McMullen, Attorneys for Defendant.

and interrogatories heretofore copied on pages 19 to 22 both inclusive.

And now at the close of the instructions of said Jury all [fol. 27] instructions requested and all instructions given by the Court of its own motion together with the exceptions of the defendant in relation thereto indorsed thereon and the notation of giving or refusal indorsed thereon are by

the Judge of said Court filed with the Clerk of said Court which instructions, endorsements and notations are as follows, towit:

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

INSTRUCTIONS TO JURY

Gentlemen of the Jury, this is what is called a civil action for damages brought by the plaintiff, Guerney O. Burtch against the defendant. The complaint is in two paragraphs and each paragraph has been read to you and will not now be given in these instructions. To each paragraph of complaint the defendant has filed answer in general denial.

No. 1. The burden of proof is upon the plaintiff to prove by a fair preponderance of evidence all the material allegations of at least one paragraph of his complaint before he can recover thereon. By a preponderance of evidence is meant a greater weight of evidence. That is to say if all the evidence in a case tending to prove a disputed point fairly outweighs all evidence to the contrary, then such disputed point is proven by a fair preponderance of the evidence.

No. 2. This is what is called a civil action and you are the exclusive judges of the facts proven as well as the credibility of the witnesses but it is your duty to accept the law as given you by the Court in these instructions as binding and correct.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

[fol. 28] PLAINTIFF'S REQUESTED INSTRUCTIONS

The plaintiff, Guerney O. Burtch, now before the commencement of argument in this case, requested the Court

to give to the jury each of the following instructions, numbered from 1 to — inclusive, to-wit:

No. 1. If you find that upon arrival of defendant's local freight train at the station of Commiskey, Indiana, on October 24th, 1917, carrying the ensilage cutter, as alleged in the complaint herein, such machine was so heavy as to make it unsafe for the regular crew upon said train and at said station in defendant's employ at the time, to attempt to unload the same and that an emergency existed authorizing the Conductor to call to his aid additional assistance and if in these circumstances the Conductor in charge of said train acting in the line of his duty and on behalf of defendant requested by-standers including plaintiff Guerney O. Burtch to assist in unloading said machine, and in response to said request plaintiff did undertake to assist in said work, then defendant owed to plaintiff while so engaged, the same duty of care that it owed to a laborer regularly in its employ while engaged in the same, or similar work and plaintiff was while so working an employee of defendant's although not expecting compensation. (Given.)

No. 2. If you find from the evidence that plaintiff was injured at the time and place and in the manner alleged in his complaint, and you further find that at the time defendant was engaged in operating a railroad in this state and was then engaged in commerce and was employing in such business five or more persons, and you further find that plaintiff was so injured while employed under the circumstances and conditions set out in the last instruction above given, and that such injuries were the result of the negligence of defendant or of its said Conductor and caused [fol. 29] by any defect, mismanagement or carelessness alleged in the complaint, and sustained by plaintiff while he was in the exercise of due care for his own safety, then defendant should be held liable for said injuries and your verdict should be for the plaintiff. (Given.)

No. 3. If you find that plaintiff was injured in the manner and under the circumstances alleged in the first paragraph of his complaint, and that at the time defendant had in its employ and engaged in conducting its said business

in this state more than five persons, then plaintiff cannot be held to have assumed the risk of any defect in the place of work or in any tool or appliance furnished him by defendant, where such defect might have been known to defendant by the exercise of ordinary care prior to such injury in time to have repaired the same or discontinued the use of such defective appliance. (Given.)

No. 4. It is the duty of the Master or employer to furnish and provide reasonably safe and suitable tools and appliances for the use of the employee in performing his duties; and it is the duty of the Master to make proper inspection to see that such tools and appliances are sound and safe for the use intended, and for any negligent failure or omission in the performance of such duty the master will be liable for damages resulting therefrom to an employe injured, without fault on his part. (Given.)

No. 5. If you find that plaintiff had a proprietary interest in the ensilage cutter by which he was injured and came upon defendant's right of way with defendant's knowledge and consent because of such interest, then he was not a trespasser, and defendant was bound to exercise ordinary care for his safety while so upon its right of way, and would be liable for any injury sustained by plaintiff because of any act of negligence or failure to use ordinary care on the part of defendant alleged in the second paragraph of plaintiff's complaint, to which plaintiffs own care-[fol. 30] lessness did not contribute. (Given.)

No. 6. If you find for the plaintiff, it will then become your duty to assess his damages; and in assessing such damages it is proper to take into account his age, the extent and character of his injuries, and whether the same are temporary or permanent, the value of any time lost by reason thereof, his expenditure if any, be shown by the evidence for medical aid, medicines and nursing in treating the same, the impairment, if any, of his ability to earn money in the future, the physical pain and mental anguish suffered or likely to be suffered in future as the direct result of such injuries, all as shown by the evidence, and any other facts affecting the question of his damages and shown by the evidence, and upon a consideration of all such facts fix

his damages at such sum as in your judgment will fairly compensate the plaintiff, so far as money can do, for the injuries so sustained, not exceeding the sum of $30,000.00. (Given.)

T. M. Honan and O. H. Montgomery, Attorneys for Plaintiff.

No. 5½. If you find from the evidence that defendant elected to unload bulky and heavy articles of freight carried by it, notwithstanding the existence of a traffic rule under which it might have compelled the consignee to unload the same and that such practice and custom continued through series of years sufficient to charge defendant with notice thereof, then defendant could not escape liability for an actionable injury sustained by one of its employees merely because of such rule. (Given.)

Instructions No. 1, 2, 3, 4, 5, 5½ and 6 above requested by plaintiff were given to the jury and the defendant at the time excepted to the giving of each of said instructions to said jury.

McMullen & McMullen, Attorneys for Defendant.
Oren O. Swails, Judge.

[fol. 31] In Circuit Court of Jackson County

[Title omitted]

Defendant's Requested Instructions

The defendant in the above entitled cause requests the Court to give to the jury trying the same each of the following instructions numbered from 1 to 14 both inclusive.

McMullen & McMullen, Kochenour & Prince, Attorneys for Defendant.

1. The burden of proving the allegations of plaintiff's complaint as made rests on the plaintiff and if you find the injury to plaintiff was caused in some other manner your verdict must be for the defendant. (Given.)

2. Plaintiff alleges that an emergency arose requiring the action of the Conductor in calling for assistance. This the plaintiff must prove as alleged and proof of custome or

habit of employees of defendant will not of itself prove this allegation. (Given.)

3. An emergency arises when there are such circumstances and conditions present that one is compelled to act on a certain manner from which there is no escape or choice to the contrary—and unless plaintiff has shown by a fair preponderance of the evidence that the Conductor acted under such circumstances, conditions and under such compulsion your verdict must be for the defendant. (Refused.)

4. A conductor cannot ordinarily hire or employ persons and bind his employer to such an extent that such employer becomes liable for injuries to such a one so employed. (Given.)

5. If you find from the evidence that Conductor Jackson had other means or ways at his command to unload the ensilage cutter on the day plaintiff was injured, or that he could have moved his train and unloaded said cutter at [fol. 32] other places there was no emergency requiring the unloading in the way and manner it was attempted to unload the same and your verdict must be for defendant on plaintiff's first paragraph of complaint. (Refused.)

6. If you find from the evidence that plaintiff with others was at the depot in Commiskey waiting for the arrival of said ensilage cutter and that upon the arrival of the same, said plaintiff and others attempted to assist in unloading the same. I charge you that plaintiff was a mere volunteer and he cannot recover. (Refused.)

7. If you find that the ensilage cutter was shipped in a train running from Louisville, Kentucky, to Commiskey and other points in Indiana, I charge you that this was an inter state shipment and said train and employees were engaged in inter state commerce and the relations of employees and defendant were governed by the Federal law and the law of the State of Indiana. I charge that if you should find from the evidence that the plaintiff was an employe of defendant at the time he received his injury and you further find that plaintiff could have known the weakness of planks used or could have known the same by using due care, he cannot recover as he must be held to have assumed the risk. (Refused.)

If you find that the evidence in this case that plaintiff and one Arbuckle went to a nearby saw mill and there procured certain planks or timbers for the purpose of unloading said ensilage cutter and that plaintiff had full opportunity to see and examine said planks and that plaintiff and said Arbuckle then carried said planks to the car and placed the same upon said car for said purpose and that plaintiff failed to use care in examining said planks or misjudged the strength thereof and one of said planks broke and plaintiff was thereby injured he cannot recover and your verdict must be for defendant. (Refused.)

[fol. 33] 9. There has been read to you a clause from what purported to be a classification of Rates, Rules, Tariffs and Regulations regarding the release of the defendant from burden of unloading said ensilage cutter—Rules such as the above referred to are allowed by law and have the same force and effect as a statute. If you find from the evidence that there was in force and effect at the time and place plaintiff was injured a rule that shipments such as the ensilage cutter should be unloaded by the owners thereof and you find that such rule had been filed with the interstate commerce commissioner and the Public Service Commission of Indiana I charge you it was not the duty of the defendant to unload said ensilage cutter. (Given.)

10. There can be no collateral attack upon a rule or regulation as referred to in the next above *on ruction*, the remedy of one being the complaint—to the Commission for reparation or relief. (Given.)

11. A published rate, rule or regulation so long as it is in force, has the effect of a statute and is binding alike on shipper and carrier and any act of either party abrogating the same in any material manner is unlawful and of no force and effect. (Refused.)

12. The law presumes that the defendant has done all in relation to any rule or tariff that the law required it to do.

13. The inter state character of a shipment remains until delivery to the shipper and is still within the protection of the commerce clause of the constitution. (Given.)

14. If you find from the evidence that the rule heretofore referred to and read to you, as contained in Classifi-

cation 44 was in force at the time of plaintiff's injury and you find that the same has been filed with the Inter State Commerce Commission theretofore, I charge you that it matters not whether the plaintiff was the consignee or not, the duty of the defendant was fixed and it was not required [fol. 34] to unload said cutter. (Given.)

The Court refused to give to the Jury instructions Nos. 3, 5, 6, 7, 8, and 11 above requested by the defendant and the defendant at the time excepted to the refusal of the Court to give to said Jury each of said instructions and the Court gave Nos. 1, 2, 4, 9, 10, 12, 13 and 14.

May 28, 1918.

McMullen & McMullen, Attorneys for Defendant.
Oren O. Swails, Judge.

In Circuit Court of Jackson County

Instructions to Jury

No. 3. In determining the weight to be given to the testimony of a witness you may take into account his manner while on the witness stand his opportunity for knowing the facts about which he testifies, his bias or prejudice, if any be disclosed, how far he is corroborated by the other evidence in the case, his intelligence or lack of intelligence, if it be shown together with all the other facts and circumstances in the case and give to the testimony of each witness such credit as in your judgment it is entitled to.

No. 4. You are bound to believe the testimony of a witness simply because that testimony has been sworn to nor should you disbelieve the testimony of any witness without good and sufficient reason for so doing. If you meet with conflicts in the testimony of witness it will be your duty to reconcile such conflicts so as to believe the testimony of all the witnesses if you can do so. If you can not do this then you may believe those you deem most worthy of credit.

No. 5. Certain interrogatories numbered 1 to 39 inclusive will be propounded to you. It will be your duty to answer each of these interrogatories in writing and sign each

answer by your foreman and return the interrogatories thus answered into open court with your verdict. If there is no evidence before you from which you can properly answer any interrogatories then you may answer said interrogatory by saying "no evidence."

[fol. 35] No. 6. If you find for the plaintiff the form of your verdict will be "We, the Jury, find for the plaintiff Guerney O. Burtch and assess his damages at the sum of $———, properly filling in the amount which you find due under the evidence.

No. 7. If you find for the defendant the form of your verdict will be "We, the Jury, find for the defendant."

No. 8. Blank forms of verdict have been prepared for you. You may use the one which suits your finding or you may prepare one for yourselves. When you retire to your jury room you will select one of your number as foreman and when you have reached a verdict have it signed by your foreman and returned by you into open Court.

Swear a Bailiff.

Oren O. Swails, Judge.

The defendant duly excepted at the time to the giving of each of the above instructions to the Jury by the Court of its own motion.

May 28th, 1918.

McMullen & McMullen, Attorneys for Defendant.
Oren O. Swails, Judge.

In Circuit Court of Jackson County

[Title omitted]

Motion for Judgment on Verdict—June 1, 1918

Comes now the plaintiff by his attorneys, and moves the Court for a judgment on the verdict of the Jury.

[fol. 36] In Circuit Court of Jackson County

[Title omitted]

Motion for Judgment on Answers

The defendant in the above entitled cause moves the Court for judgment in its favor on the interrogatories and answers thereto returned by said Jury with their general verdict in said cause notwithstanding said general verdict.

McMullen & McMullen, Kochenour & Prince, Attorneys for Defendant.

and this cause is now continued generally until the next term of this Court.

In Circuit Court of Jackson County

[Title omitted]

Motion for New Trial—Filed June 25, 1918

The defendant in the above entitled cause moves the Court for a new trial therein on the following grounds and each of them to-wit:

1. The Court erred in admitting in evidence the testimony of the witness, Clifford Hartwell, as to the practice of the defendant or its Conductors calling of by-standers for as-
[fol. 37] sistance when needed to unload heavy freight.

2. The Court erred in the overruling of the motion of the defendant to strike out the answer of the witness last referred to—the question last above referred to.

3. The Court erred in admitting in evidence the testimony of the witness D. M. Green as to the practice of the defendant and its Conductors of calling in by-standers to assist unloading heavy articles of freight.

4. The Court erred in refusing to strike out the answer of the witness last above referred to—the question last above referred to.

5. The Court erred in admitting in evidence the testimony of the witness Charles F. Lurton as to the practice of the defendant and its Conductors of calling for assistance in unloading heavy articles of freight. The court erred in overruling the motion of defendant to strike out their answer of the witness to said question to the effect that it was a frequent occurrence for a train crew to ask for help.

6. The Court erred in overruling the motion to strike out the answer of the witness of Oliver P. Gothlin to the following question:

"State to what extent or otherwise the acts of carriers are governed by written tariff rules filed with the Commission." The answer being "Carriers so far as possible in human language are permitted to state definite and clearly in tariffs all rules and regulations to govern the relation between patron and carrier, nevertheless, times are yet to come when human ability can so state everything so clearly that interpretation will not be necessary.

7. The Court erred in overruling the motion of the defendant to strike out the answer next above referred to—the question next above referred to.

8. The Court erred in admitting in evidence the testi- [fol. 38] mony of the said witness Oliver P. Gothlin as to whether certain railroad carriers in his and other states have a rule in regard to handling of certain heavy and bulky freight.

9. The Court erred in overruling the motion of the defendant to strike out the answer to the question next above referred to.

10. The Court erred in admitting in evidence the testimony of said witness Gothlin as to what in his experience and knowledge had been the practice of carriers with reference to the disposition of cars or bulky shipments purporting to come under a certain rule of the tariff known as 8-B.

11. The Court erred in refusing to strike out the answer of said witness to the question next hereinabove mentioned.

12. Damages assessed by the Jury are excessive, being too large.

13. The verdict of the jury is not sustained by sufficient evidence.

14. The verdict of the Jury is contrary to law.

15. The Court erred in giving instructions Nos. 1 to 8 both inclusive on its own motion and erred in giving each of said instructions.

16. The Court erred in giving instructions Nos. 1, 2, 3, 4, 5, 5½, and 6 both inclusive requested by the plaintiff and erred in giving each of said instructions.

17. The Court erred in refusing to give instructions Nos. 3, 5, 6, 7 and 8 requested by defendant and erred in refusing to give each of said instructions.

Kochenour & Prince, McMullen & McMullen, Attorneys for Defendant.

Attest: Willard Stout, Clerk J. C. C.

[fol. 39] In Circuit Court of Jackson County

[Title omitted]

Judgment—Oct. 23, 1918

Come the parties by their respective attorneys as heretofore, and the court being duly advised overrules defendant's motion for judgment on the answers of the Jury to the Interrogatories, to which ruling of the Court, the defendant excepts.

The court now sustains plaintiff's motion for judgment on the general verdict, to which ruling of the Court defendant excepts.

It is therefore considered and adjudged by the Court that the plaintiff Guerney O. Burtch do have and recover of and from the defendant, The Baltimore and Ohio Southwestern Railroad Company the sum of Eight Thousand Dollars, together with his costs herein laid out and expended, with interest thereon from the time of the filing of the verdict of the Jury; to the rendering of which judgment the defendant objects and excepts.

The Court being duly advised in the premises overrules defendant's motion for a new trial of this cause, to which ruling of the court in overruling said motion for a new trial, the defendant at the time, excepts and prays an appeal to the Supreme Court of the State of Indiana, which appeal is granted by the Court and the bond for said appeal is fixed at Ten Thousand Dollars, the defendant nominates American Surety Company of New York, as surety on said bond which said surety is approved by the Court and the defendant is given thirty days to file said bond with the Clerk of this Court. Defendant is given ninety days within which time to present and files its general bill of exceptions —All of which is ordered and adjudged by the Court.

[fol. 40] Bond on appeal for $10,000.00 approved and filed Oct. 23, 1918, omitted in printing.

[fol. 41] In Circuit Court of Jackson County

[Title omitted]

Be it remembered that on the 5th day of March, 1924, the above named plaintiff, Lula A. Burtch, Admrs., filed in the office of the Clerk of said Jackson Circuit Court, the opinion of Supreme Court, to-wit:

Minute Entries of Proceedings in Supreme Court

In the Supreme Court

State of Indiana:

Be it remembered, that heretofore to-wit: on the 17th day of January, 1919, the same being the 47th Judicial day of the November, 1918, Term of said Supreme Court, Baltimore and Ohio Southwestern Railroad Company, by its attorneys, McMullen and McMullen, filed in the office of the Clerk of said Supreme Court of said State of Indiana, a transcript of the record and proceedings had in the Jackson Circuit Court of said State of Indiana, in a cause wherein The Baltimore and Ohio Southwestern Railroad Company was appellant, and Guerney O. Burtch was ap-

pellee, together with an assignment of errors by appellant [fol. 42] and its appeal bond, which said transcript was filed as a term time appeal, and are in the words and figures following, to-wit:

And afterwards to-wit: On the 17th day of February, 1919, being the 73rd judicial day of the November Term, 1918, of said Supreme Court the following further pleas and proceedings were had in said cause, to-wit:

Comes now the parties by their counsel, and this cause is submitted to the Court for judgment and decree as provided by an act of the General Assembly of the State of Indiana, approved March 5th, 1917, and the rules of said Supreme Court adopted in relation thereto.

And afterwards to-wit: On the 26th day of March, 1919, being the 105th judicial day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellant by counsel and files a petition for an extension of time in which to file brief and on said March 26th, 1919, the court being fully advised, said petition was granted and time extended to and including May 16, 1919.

And afterwards to-wit: On the 16th day of May, 1919, being the 149th judicial day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellant by counsel and files appellant's briefs (8).

And afterwards, to-wit: On the 29th day of May, 1919, being the 4th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellee by counsel and files objections to the record and briefs.

And afterwards, to-wit: On the 4th day of June, 1919, [fol. 43] being the 9th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellee by counsel and the Court being advised in the premises grants the petition for time to file brief, which petition was filed June 4th, 1919, and time is extended to and including August 15th, 1919.

And afterwards, to-wit: On the 17th day of July, 1919, being the 46th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes the appellee by counsel and files petition for extention of time in which to file brief, which petition is granted and time extended to and including October 1st, 1919.

And afterwards, to-wit: On the 28th day of August, 1919, being the 82nd judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the parties by counsel and file an application for order on appellee's attorney to return the record to the Clerk's office and for permission to amend briefs.

And afterwards, to-wit: On the 6th day of September, 1919, being the 90th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel and the court being advised in the premises, directs the Clerk to notify attorneys for appellee that the motion to amend briefs will be heard on September, 18th, 1919, or as soon thereafter as it can be heard and notice issued.

And afterwards to-wit: On the 17th day of September, 1919, being the 99th judicial day of the May Term, 1919, [fol. 44] of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellee by counsel and files objections to appellant's application for leave to amend brief.

And afterwards, to-wit: on the 26th day of September, 1919, being the 107th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellee by counsel and files briefs (8) in said cause.

And afterwards, to-wit: On the 7th day of October, 1919, being the 116th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel and the court being advised in the premises, grants application of appellant for permission to amend brief.

And afterwards, to-wit: on the 14th day of October, 1919, being the 122nd judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel and the court being advised in the premises, grants appellant's petition for time to file brief and time is extended to and including November 2nd, 1919.

And afterwards, to-wit: on the 3rd day of November, 1919, being the 139th Judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellant by counsel and files its briefs (8).

And afterwards, to-wit: on the 3rd day of November, 1919, being the 139th judicial day of the May Term, 1919, of said Supreme Court, the following further pleas and [fol. 45] proceedings were had in said cause, to-wit:

Comes now the appellant by counsel and files its reply briefs (8).

And afterwards, to-wit: on the 30th day of September, 1920, being the 139th judicial day of the May Term, 1920, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellee by counsel and files additional authorities (8).

And afterwards, to-wit: on the 14th day of March, 1922, being the 92nd judicial day of the November, 1921, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel and the Court being advised in the premises, affirms the judgment of the Court below in the above entitled cause, with an opinion pconounced by Myers, J., which opinion is in the words and figures following, to-wit: (Here Insert).

And afterwards, to-wit: on the 9th day of May, 1922, being the 140th judicial day of the November Term, 1921, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the appellant by counsel and files petition with briefs (8) thereon for rehearing of the above entitled

cause, which petition is in words and figures following, to-wit: (H. I.).

And afterwards, to-wit: on the 8th day of June, 1922, being the 16th judicial day of the May Term, 1922, of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Comes now the parties by counsel and the Court being advised in the premises, modifies the mandate and appellant's petition for hearing is denied.

[fol. 46] And afterwards, to-wit: on the 15th day of February, 1924, being the 71st judicial day of the November Term, 1923 of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel and the court being advised in the premises, files mandate of reversal of said cause from the Supreme Court of the United States.

And afterwards, to-wit: on the 29th day of February, 1924, being the 83rd judicial day of the November Term, 1923 of said Supreme Court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties by counsel and the court being advised in the premises, reverses the judgment of said cause in obedience to the mandate of the Supreme Court of the United States, with an opinion pronounced per curiam.

Certificate to foregoing paper omitted in printing.

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reversing judgment of lower Court heretofore had in said cause, and a motion for a new trial was granted pursuant to said opinion.

[fol. 47] In Circuit Court of Jackson County

[Title omitted]

Amended Complaint for Personal Injuries and Death

Demand $30,000.00

Pat. I. The plaintiff, Lula A. Carrol as administratrix of the estate of Guerney O. Burtch, deceased, for first para-

graph of amended complaint herein, complains of defendant The Baltimore and Ohio Southwestern Railroad Company, and says, that on the 24th day of October 1917, the defendant was, has since been, and still is, a corporation, duly organized under the laws of the State of Indiana, and engaged in operating a steam railroad in said State of Indiana, *and engaged in operating a steam railroad in said said State* and in and through Jackson, Jennings and other Counties therein, and during all of said time had in its employ and engaged in its said business, more than five persons; that the town of Commiskey in said county of Jennings was on the date first named a station on the line of defendant's said road, where it maintained a side track East of the main track, and a stub switch or loading track East of said side track; that on said date a local freight train, operated by defendant and in charge of one Ed Jackson, who was then and there in defendant's employ as conductor, arrived at said station, carrying a machine known as an ensilage cutter, which defendant had theretofore received to be transported by it to said station, and delivered to one Charles F. Lurton as consignee; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it had been transported; and, that said machine was very heavy, and with its crating and attachments weighed about 1800 pounds; that defendant had in its em-[fol. 48] ploy upon said train three other persons as brakemen, and no more, whose duty it was to assist said Jackson in the handling of freight; and said conductor and brakemen were unable to unload said machine with safety by reason of its great weight; and defendant had carelessly and negligently failed and omitted to provide and furnish a force of men sufficient to unload the same with safety, and because of that fact an emergency arose and then and there existed for the employment of additional help to unload said machine; that thereupon said Jackson as such conductor acting in line of his duty and for and on behalf of defendant requested plaintiff's decedent Guerney O. Burtch to assist in unloading said machine, and under the circumstances aforesaid and in obedience to said request, and not otherwise, said Burtch accepted said employment and undertook to assist in said work; that defendant should

and could have furnished and supplied strong, safe and suitable skids and appliances for unloading said machine, but it carelessly, and negligently failed to furnish any appliances for such use; that said machine could safely, and should have been unloaded upon the platform from said train while standing upon the main track, but defendant carelessly and negligently failed so to unload the same; that said machine could have been safely unloaded upon the ground to the East by placing the car in which it had been transported upon said stub switch, but defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on said side track, and its said conductor in charge of said work caused two green plank 10 or 12 feet in length to be brought from a nearby saw mill, and by means of said plank, which were defective, weak and of insufficient strength, carelessly and negligently undertook to unload said machine from said car while on said side track, over the tracks of said stub switch eastward to the ground beyond, and carelessly and negli- [fol. 49] gently failed to inspect, test, or support said planks, but negligently pronounced them safe and sufficient, and carelessly and negligently ordered and directed said machine to be unloaded and moved from said car upon said planks, and while said machine was being so unloaded and while said Burtch was assisting in said work as aforesaid and in the exercise of due care, one of said planks broke and said machine fell upon him, and crushed his body to the ground and broke three ribs on his left side and injured his spine and spinal cord, and bruised and injured his flesh muscles and nerves, whereby his legs, bowels, bladder, and the muscles and nerves of the lower part of his body were permanently paralyzed, and he was made sick and sore, and from his said injuries he suffered great physical pain and mental anguish, and continued so to suffer for three years and four months, and by reason of his said injuries was compelled to and did incur expenses in the sum of $1,000, for care, nursing, medicine, and medical aid, and traveling expenses in attempts to heal and cure the same. That he was a farmer, 31 years of age, married and had a wife and two children, and at the time of receiving his said injuries was sound in body and in good health, and was able to work and earn money and

support his family, but because of his said injuries he was confined to his bed and home, and rendered permanently unable to perform manual labor, and made a dependent cripple and unable to care for himself and to relieve the demands of nature without aid, in which condition he lingered for three years and four months.

Plaintiff further avers that on the — day of October, 1918, said Guerney O. Burtch, recovered a judgment in the Jackson Circuit Court of Jackson County, Indiana, against defendant, for and on account of his said injuries caused as aforesaid; and, that afterwards defendant perfected and prosecuted an appeal from said judgment to the Supreme Court of Indiana, and while said cause was pending on said appeal in said Court, to-wit on the 10th [fol. 50] day of February, 1921, from and as the result of his said injuries said Guerney O. Burtch died, and left surviving as his next of kin, and dependent upon him for support, his wife Lula A. Burtch, and two children, viz: Lois Ellen Burtch five years of age, and Robert Earl Burtch three years of age; that afterward, to-wit on the 14th day of March 1922, said Supreme Court of Indiana, duly affirmed said judgment; and thereafter said cause was by writ of Certiorari duly transferred to the Supreme Court of the United States, and by order of said Court plaintiff as such administratrix was admitted as a party to said action and substituted as plaintiff instead of said Guerney O. Burtch, deceased; and subsequently, towit on the 7th day of January 1924, said judgment was by the Supreme Court of the United States reversed, and remanded to the Supreme Court of Indiana and by it on the 29th day of February 1924 reversed, and returned to this court for further proceedings.

That on the 14th day of February 1921, this plaintiff was by the Jennings Circuit Court duly appointed as administratrix of the estate of said Guerney O. Burtch, and thereupon duly qualified, and has since been and now is acting as such administratrix, and as such prosecutes this action, and avers that said decedent in his lifetime and this plaintiff by his death all by reason of his said injuries, have sustained damages in the sum of Thirty Thousand Dollars.

Plaintiff further avers, that said injuries and damages were caused solely by and as the direct result of the care-

lessness and negligence and omissions of duty of said defendant and its said conductor as aforesaid, and inflicted while the said Burtch was in the exercise of due care on his part.

Par. II. The plaintiff complains of defendant, The Baltimore and Ohio Southwestern Railroad Company and for second paragraph of amended complaint herein says, that on the 24th day of October 1917, defendant was, has since been and still is, a corporation, duly organized under the [fol. 51] laws of the State of Indiana, and engaged in operating a steam railroad in said State, and extending through Jackson, Jennings and other counties therein; that the town of Commiskey in said County of Jennings was a station on the line of defendant's said road on the date first name-, where it maintained a depot and platform on the West side of its main track, and a side track East of the main track, and a stub switch or loading track East of said side track; that on said date a local freight train, operated by defendant, and in charge of one Ed Jackson, who was then and there in defendant's employ as Conductor, arrived at said station carrying a machine known as an ensilage cutter, which defendant had heretofore received to be transported to and delivered at said station; that one Charles F. Lurton, a local merchant was the consignee of said machine, and plaintiff's decedent Guerney O. Burtch and six of his neighbors had contracted to buy the same of said Lurton, and said Burtch was planning to use said machine upon his farm the following day, and by reason of said facts was interested in said shipment and came upon defendant's right of way; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it had been transported, and said machine was very heavy, and with its cratings and attachments weighed about 1800 pounds; that defendant had in its employ upon said train besides said conductor, three brakemen and no more whose duty it was to assist said conductor in handling freight; and by reason of its great weight said conductor and brakemen were unable to unload said machine with safety; and defendant had carelessly and negligently failed to provide and furnish a force sufficient to handle and unload said machine in safety, and that defendant could and should have furnished strong,

safe and suitable skids and appliances for unloading said machine, but it had carelessly and negligently failed and omitted to furnish any appliances for such purpose; and, [fol. 52] that said machine could safely, and should have been unloaded upon the platform from said train while standing upon the main track, but defendant carelessly and negligently failed so to unload the same; that said machine could have been safely unloaded upon the ground to the East by placing the car in which it had been carried upon said stub switch, but defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on said track, and its said conductor in charge of said work caused two green planks which were defective, weak and of insufficient strength to support said machine, carelessly and negligently undertook to unload said machine from said car while on said side track over the rails of said stub switch eastward to the ground, and carelessly and negligently failed to inspect, test or support said planks, but carelessly and negligently pronounced the same safe and sufficient and carelessly and negligently ordered and directed said machine to be unloaded and moved upon said planks and thence to the ground; that in these circumstances and because of his interest in said machine said Burtch went upon the right of way of defendant, and at the request and with the knowledge and consent of said conductor undertook to assist in unloading said machine, and while engaged in said work and in the exercise of due care for his own safety and without any knowledge or notice of the danger to which he was exposed, one of said planks broke under the weight of said machine, and said machine fell upon him and crushed his body to the ground, and thereby broke three ribs on his left side injured his spine and spinal cord, bruised and injured his flesh, muscles and nerves, whereby both his legs, his bowels, bladder, and the nerves and muscles of the lower part of his body were permanently paralyzed, and he was made sick and sore, and suffered great physical pain and mental anguish, and continued so to suffer for three years and four months, and by reason of his said injuries he was compelled to and did [fol. 53] incur expense in the sum of $1000 for care, nursing, medicines, medical aid, and expenses in travelling in attempts to heal and cure the same; that he was a farmer

31 years of age, married and had a wife and two children, and before receiving said injuries he was sound in body and in good health, and able to work and earn money and support himself and family, but because of said injuries he was confined to his home and bed for many months, and rendered permanently unable to perform manual labor, and made a dependent cripple, and unable to care for himself and to relieve the demands of nature without assistance, in which condition he lingered for three years and four months.

Plaintiff further avers that on the — day of October, 1918, said Guerney O. Burtch recovered a judgment in the Jackson Circuit Court of Jackson County, Indiana, against defendant, for and on account of his said injuries caused as aforesaid; and, that afterwards defendant perfected and prosecuted an appeal from said judgment to the Supreme Court of Indiana, and while said cause was pending in said Court upon said appeal, towit on the 10th day of February 1921, said Guerney O. Burtch died; and that afterwards towit on the 14th day of February 1921, this plaintiff was duly appointed by the Jennings Circuit Court, as administratrix of the estate of said decedent, and thereupon duly qualified and ever since has been and now is acting as such administratrix. That said decedent left surviving him as his next of kin and dependent upon him for support, his wife Lula A. Burtch, and two children, viz: Lois Ellen Burtch, five years of age, and Robert Earl Burtch, three years of age; and that afterwards, towit: on the 14th day of March, 1922, said Supreme Court of Indiana, duly affirmed said judgment; and thereafter said cause was by writ of Certiorari transferred to the Supreme Court of the United States, and by order of said court this plaintiff as administratrix of said estate was admitted as a [fol. 54] party to said action and substituted as plaintiff instead of said Guerney O. Burtch, deceased; and subsequently, towit on the 7th day of January, 1924, said judgment was by the Supreme Court of the United States, reversed on the 29th day of February, 1924, and remanded to this Court for further proceedings.

Plaintiff further avers that said injuries resulted in damages to said decedent and to plaintiff in the sum of Thirty Thousand Dollars, all of which were caused solely by and

as the direct result of the carelessness and negligence and omissions of duty of said defendant and its said conductor as aforesaid, and inflicted while said Burtch was in the exercise of due care for his own safety, and without notice or knowledge of the danger to which he was exposed.

Par. III. The plaintiff Lula A. Carroll as administratrix of the estate of Guerney O. Burtch deceased, complains of defendant, The Baltimore and Ohio Southwestern Railroad Company, and says, that on the 24th day of October 1917, the defendant was, has since been and still is, a corporation duly organized, and engaged in operating a steam railroad extending from the City of Louisville in the State of Kentucky into and through the County of Jennings in the State of Indiana, and was a common carrier of both freight and passengers; that on said date the town of Commiskey in said County of Jennings, was a station on the line of defendant's said railroad, where it maintained a depot and platform on the West side of its main track, and a side track East of the main track, and a stub switch or loading track East of said side track; that on said date a local freight train, running, from the City of Louisville, Kentucky, to the City of North Vernon, Indiana, operated by defendant and in charge of one Ed Jackson, as conductor, who was then and there in defendant's employ, arrived at said station carrying a machine known as an ensilage cutter, which defendant had received at Louisville, Kentucky, to [fol. 55] be carried by it to Commiskey, Indiana, consigned to one Charles F. Lurton; that it then and there became and was the duty of said Jackson as such conductor to unload said machine from the car in which it had been transported; and that said machine was very heavy, and with its crating and attachments weighed about 1800 pounds; that defendant had in its employ upon said train three other persons as brakemen, and no more, whose duty it was to assist said Jackson in the handling of freight; and said conductor and brakemen were unable to unload said machine with safety, and because of that fact an emergency arose and then and there existed for the employment of additional help to unload said machine; that thereupon said Jackson as such conductor, acting in line of his duties, and for and on behalf of defendant, requested plaintiff's decedent Guerney O. Burtch to assist in unloading said machine, and under the

circumstances aforesaid, and in obedience to said request and not otherwise, said Burtch accepted said employment and undertook to assist in said work; and that while engaged in unloading said machine both said Guerney O. Burtch and defendant were employed in interstate commerce; and that defendant could and should have supplied and furnished strong, safe and suitable skids and appliances for unloading said machine, but it carelessly and negligently failed to furnish any appliances for such use; that said machine could safely, and should have been unloaded upon the platform from said train while standing upon the main track, but defendant carelessly and negligently failed so to unload the same; that said machine could have been safely unloaded upon the ground to the East by placing the car in which it had been transported upon said stub switch, but the defendant carelessly and negligently failed so to do said work; that defendant caused said train to be placed on said side track, and its said conductor in charge of said work caused two green planks ten or twelve feet in length to be brought from a near by saw mill, and by [fol. 56] means of said planks which were defective, weak and of insufficient strength, carelessly and negligently undertook to unload said machine from said car while on said side track, over the rails of said stub switch Eastward to the ground beyond, and carelessly and negligently failed to inspect, test or support said planks, but negligently pronounced them safe and sufficient, and carelessly and negligently ordered and directed said machine to be unloaded and moved from said car upon said planks, and while said machine was being so unloaded and while said Burtch was assisting in said work, as aforesaid and in the exercise of due care, and without and knowledge of the danger to which he was exposed, one of said planks broke and said machine fell upon him and crushed his body to the ground and broke three ribs on his left side and injured his spine and spinal cord, and bruised and injured his flesh, muscles and nerves whereby his legs, bowels, blad-er and the muscles and nerves of the lower part of his body were permanently paralyzed, and he was made sick and sore, and from his said injuries he suffered great physical pain and mental anguish, and continued so to suffer for three years and four months, and by reason of said injuries he was compelled to and did incur

expense in the sum of $1000.00, for care, nursing, medicine, medical aid and traveling expenses in attempts to heal and cure the same. That he was a farmer, 31 years of age, married and had a wife and two children, and at the time of receiving his said injury was sound in body and in good health, and was able to work and earn money and support his family, but because of his said injuries he was confined to his bed and home for many months, and rendered permanently unable to perform manual labor, and made a dependent cripple and unable to care for himself and to relieve the demands of nature without aid, in which condition he lingered for three years and four months.

Plaintiff further avers that on the — day of October, 1918, said Guerney O. Burtch, recovered a judgment in the [fol. 57] Jackson Circuit court of Jackson County, Indiana, against defendant, for and on account of his injury, caused as aforesaid; and that afterwards defendant perfected and prosecuted an appeal from said judgment to the Supreme Court of Indiana, and while said cause was pending in said court upon such appeal, to-wit, on the 10th day of February, 1921, said Guerney O. Burtch died from and as the direct result of his said injuries; and that on the 14th day of February 1921, this plaintiff was duly appointed by the Jennings Circuit Court as administratrix of the estate of said decedent, and thereupon duly qualified and ever since has been and now is acting as such administratrix. That said decedent left surviving him as his next of kin and dependent upon him for support his wife Lula A. Burtch, and two children, viz: Lois Ellen Burtch, 5 years of age, and Robert Earl Burtch, 3 years of age; that afterwards, towit, on the 14th day of March, 1922, said Supreme Court of Indiana, duly affirmed said judgment; and thereafter by writ of certiorari said cause was duly transferred to the Supreme Court of the United States, and by order of said court this plaintiff, as administratrix, was admitted as a party to said action, and substituted as plaintiff in place of said Guerney O. Burtch, deceased; and subsequently, to-wit, on the 7th day of January, 1924, said judgment was by the Supreme Court of the United States reversed and remanded to the Supreme Court of Indiana, and by that court reversed, and returned to this court for further proceedings.

Plaintiff further avers that by reason of his said injuries the decedent Guerney O. Burtch in his lifetime, and this plaintiff by his death have sustained damages in the sum of $30,000.00, which injuries and damages were caused solely by and as the direct result of the carelessness and negligence of said defendant and of its said conductor, as herein before alleged, and said injuries were inflicted while [fol. 58] said Burtch was in the exercise of due care for his safety and without knowledge or notice of the danger to which he was exposed.

Wherefore plaintiff demands judgment against said defendant for the sum of $30,000.00 and for all other proper relief.

Thos. M. Honan and Montgomery & Montgomery,
Attorneys for Plaintiff.

and the defendant is ruled to answer said complaint.

In Circuit Court of Jackson County

[Title omitted]

Minute Entry—Mar. 7, 1924

Come again the parties by their respective attorneys, and defendant is ruled to answer plaintiff's amended complaint heretofore filed; on or before March 13th, 1924, which amended complaint reads as follows to-wit: Heretofore copied on page 43 to 54 both inclusive.

In Circuit Court of Jackson County

[Title omitted]

[fol. 59] Motion to Require Separation of Causes of Action—Filed Mar. 13, 1924

Comes now the defendant in the above entitled cause and moves the court to require the plaintiff to separate her causes of action in the first, second and third paragraphs

of amended complaint and the cause of action as stated in each of said paragraphs into separate paragraphs and number each thereof and state each of said separate causes for the reason that there are several causes of action united in each of said paragraphs of said amended complaint.

Estelle B. Prince and McMullen & McMullen, Attorneys for Defendant.

In Circuit Court of Jackson County

[Title omitted]

Order Overruling Motion to Require Separation—Mar. 21, 1924

Come now the parties, and the court being sufficiently advised, now overruled defendant's motion to separate causes of action in the above entitled cause, to which ruling of the Court the defendant at the time excepts.

[fol. 60] In Circuit Court of Jackson County

[Title omitted]

Motion to Strike—Filed Mar. 24, 1924

The Defendant in the above entitled cause moves the Court to strike out and reject from the amended complaint and from the first paragraph of said amended complaint each word, phrase and clause of the following part thereof, towit:—

"Plaintiff further avers that on the — day of October, 1918, said Guerney O. Burtch recovered a judgment in the Jackson Circuit Court of Jackson County, Indiana, against defendant, for and on account of his said injuries caused as aforesaid; and, that afterwards defendant perfected and prosecuted an appeal from said judgment to the Supreme Court of Indiana, and while said cause was pending on said appeal in said Court, towit on the 10th day of February

1921, from and as the result of his said injuries said Guerney O. Burtch died, and left surviving as his next of kin, his wife Lula A. Burtch, and two children, viz: Lois Ellen Burtch, five years of age, and Robert Earl Burtch, three years of age; that afterward, towit on the 14th day of March 1922, said Supreme Court of Indiana, duly affirmed said judgment; and thereafter said cause was by writ of Certiorari duly transferred to the Supreme Court of the [fol. 61] United States, and by order of said Plaintiff as such administratrix was admitted as a party to said action and substituted as plaintiff instead of said Guerney O. Burtch, deceased; and subsequently towit on the 7th day of January 1924, said judgment was by the Supreme Court of the United States reversed, and remanded to the Supreme Court of Indiana and by it on the 29th day of February 1924 reversed and returned to this Court for further proceedings."

For the reason that said part of said first paragraph of amended complaint and each word, phrase, clause and line thereof is irrelevant, immaterial, outside of the issues and if permitted to go to the jury will be prejudicial and unjust to the defendant.

Also the defendant moves the Court to strike from the second paragraph of said amended complaint the following part thereof and each word, line phrase and clause thereof towit:

"Plaintiff further avers that on the — day of October 1918, said Guerney O. Burtch recovered a judgment in the Jackson Circuit Court of Jackson County, Indiana, against defendant, for and on account of his said injuries caused as aforesaid; and, that afterwards defendant perfected and prosecuted an appeal from said judgment to the Supreme Court of Indiana, and while said cause was pending in said Court upon said appeal, towit on the 10th day of February 1921, said Guerney O. Burtch died; and afterwards towit on the 14th day of February 1921, this plaintiff was duly appointed by the Jennings Circuit Court, as administratrix of the estate of said decedent, and thereupon duly qualified and ever since has been and now is acting as such administratrix. That said decedent left surviving him as his next of kin and dependent upon him for support, his wife Lula

A. Burtch, and two children, Viz: Lois Ellen Burtch, five years of age, and Robert Earl Burtch, three years of age; and that afterwards, towit on the 14th day of March, 1922, said Supreme Court of Indiana, duly affirmed said judgment; and thereafter said cause was by writ of Certiorari [fol. 62] transferred to the Supreme Court of the United States, and by order of said court this plaintiff as administratrix of said estate was admitted as a party to said action and substituted as plaintiff instead of said Guerney O. Burtch, deceased; and subsequently towit, on the 7th day of January 1924, said judgment was by the Supreme Court of the United States, reversed, and remanded to the Supreme Court of Indiana, and by it reversed on the 29th day of February 1924, and remanded to this Court for further proceedings". For the reasons that said part of said second paragraph of amended complaint and each word, phrase, clause and line thereof is irrelevant, immaterial, outside of the issue and if permitted to go to the jury will be prejudicial and unjust to the defendant.

Also the defendant moves the Court to strike out and reject the following the third paragraph of amended complaint and each word, line, phrase and clause thereof, towit:

"Plaintiff further avers that on the — day of October, 1918, said Guerney O. Burtch, recovered a judgment in the Jackson Circuit Court of Jackson County, Indiana, against defendant, for and on account of his said injury, caused as aforesaid; and that afterwards defendant perfected an appeal from said judgment to the Supreme Court of Indiana, and while said cause was pending in said Court upon such appeal, towit, on the 10th day of February 1921, said Guerney O. Burtch died from and as a direct result of his said injuries; and that on the 14th day of February 1921, this plaintiff was duly appointed by the Jennings Circuit Court as administratrix of the estate of said decedent, and thereupon duly qualified and ever since has been and now is acting as such administratrix. That said decedent left surviving him as next of kin and dependent upon him for support his wife, Lula A. Burtch, and two children, viz: Lois Ellen Burtch, 5 years of age, and Robert Earl Burtch, 3 years of age; that afterwards, towit on the 14th

[fol. 63] day of March, 1922, said Supreme Court of Indiana, duly affirmed said judgment; and thereafter by writ of certiorari said cause was duly transferred to the Supreme Court of the United States, and by order of said Court this plaintiff, as administratrix, was admitted as a party to said action, and substituted as plaintiff in place of said Guerney O. Burtch, deceased; and subsequently, towit, on the 7th day of January, 1924, said judgment was by the Supreme Court of the United States reversed and remanded to the Supreme Court of Indiana, and by that Court reversed, and returned to this court for further proceedings."

For the reason that said part of said third paragraph of amended complaint and each word, phrase, clause and line thereof is irrelevant, immaterial, outside the issues and if permitted to go to the jury will be prejudicial and harmful to defendant.

Also the defendant moves the Court to strike out and reject from said first paragraph of amended complaint the following part and each word, line, phrase and clause thereof, towit:

"He was made sick and sore, and from his injuries he suffered great physical pain and mental anguish and continued so to suffer for three years and four months, and by reason of his said injuries was compelled to and did incur expense in the sum of $1000, for care, nursing, medicine, and medical aid, and traveling expenses in attempts to heal and cure the same."

For the reason that said part and each phrase, word, line and clause is irrelevant, immaterial, outside the issues and if permitted to go to the jury will be prejudicial and unjust to the defendant and are allegations of injuries and damages for which this plaintiff cannot recover in this action.

Also the defendant moves the Court to strike out and reject from each the second and third paragraphs of said amended complaint the following part and each word, phrase, clause and line of each of said parts of each of said paragraphs, towit:

[fol. 64] "and he was made sick and sore, and from his said injuries he suffered great physical pain and mental

anguish, and continued so to suffer for three years and four months, and by reason of said injuries he was compelled to and did incur expense in the sum of $1000.00 for care, nursing, medicine, medical aid and traveling expenses in attempts to heal and cure the same."

For the reason that each word, line, phrase and clause of said parts is irrelevant, immaterial, outside the issues and if permitted to go to the jury will be prejudicial and unjust to the defendant and are allegations of injuries and damages for which this plaintiff cannot recover in this action.

Prince & Mullins, Attorneys for Defendant.

and the Court being duly advised in the premises now overrules said motion, to which ruling of the Court the defendant now excepts.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

[fol. 65] MOTION TO MAKE AMENDED COMPLAINT MORE SPECIFIC—Filed Mar. 31, 1924

The defendant in the above entitled cause moves the Court to require the plaintiff herein to make her amended complaint and each paragraph thereof more specific in each of the following particulars, to-wit:

1. To state what notice, if any, plaintiff's decedent had of the arrival of the ensilage cutter mentioned in each of said paragraphs.

2. To state whether the shipment of said ensilage cutter constituted a car load or less than a car load lot.

3. To state in each of said paragraphs whether the shipment of said ensilage cutter was made under a contract in writing.

4. To set out in each of said paragraphs, or attach thereto, a copy of said contract of shipment.

5. To state in each of said paragraphs at what point, city and state, defendant "had theretofore received" said

machine "to be transported by it to said station and delivered to one Charles F. Lurton as consignee."

6. To allege facts showing how "it then and there became and was the duty of said Jackson as such conductor to unload said machine."

7. To state how or in what manner or means said conductor caused to be brought the two green planks mentioned in each of said paragraphs.

8. To state in what particular said planks were "defective."

9. To state in what particular or particulars said planks were defective, weak and insufficient, that is, were said planks, weak defective and insufficient from size, quality or how.

Prince and McMullen & McMullen, Attys. for Defendant.

MOTION TO MAKE AMENDED COMPLIANT MORE SPEC. OVERRULED

And the Court being duly advised now overrules said motion, to which ruling of the court the defendant excepts.

[fol. 66] IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

INTERROGATORIES TO PLAINTIFF—Filed April 2, 1924

The defendant respectfully moves the court for an order requiring the plaintiff herein to answer the following interrogatories and each of them under oath and make due return of the same into this Court, viz:

1. What was the date of the death of plaintiff's decedent Guerney Burtch?

2. What was the date of the injury to said Guerney O. Burtch, which is alleged to have caused his death?

3. On what date did plaintiff file her amended complaint herein?

4. Was not the injury to plaintiff's decedent, Guerney O. Burtch, on which plaintiff bases her action herein and

which is claimed to have caused his death, the same injury for which said Guerney O. Burtch sued and recovered judgment in the Circuit Court of Jackson County, Indiana, which judgment was thereafter affirmed by the Supreme Court of Indiana, and afterwards reversed by the Supreme [fol. 67] Court of the United States?

5. Was not said decedent, Guerney O. Burtch, over the age of twenty-one years at the time of the alleged injury?

6. Was not said Guerney O. Burtch, a resident of Jennings County, Indiana, at the time of the alleged injury?

7. Did not the said Guerney Burtch continue to reside in said Jennings County, Indiana, from the date of the alleged injury to the date of his death?

8. If you answer interrogatory #7 "No," then state where he did reside between the two dates mentioned.

9. Was said decedent, Guerney O. Burtch, under any legal disability between the date of the alleged injury and the date of his death?

10. In what county and state was said alleged injury received?

11. Are you the duly qualified, appointed and acting administratrix of the estate of said Guerney O. Burtch, deceased?

12. What was the date of your appointment?

13. By what Court were you so appointed?

14. Have you been acting continuously as such administratrix since the date of your appointment?

15. What is the theory of the first paragraph of your amended complaint?

16. What is the theory of the second paragraph of your amended complaint.

17. What is the theory of the third paragraph of your amended complaint.

18. Were you the former wife of your decedent?

19. Who procured the two green planks mentioned in your complaint?

20. Who brought the two green planks mentioned in your amended complaint to the car with which to unload the ensilage cutter?

[fol. 68] 21. In what way were the two green planks weak, defective and insufficient?

22. Did said ensilage cutter come from the City of Louisville, State of Kentucky to the station of Commiskey in the State of Indiana, in said car and train?

23. Did said ensilage cutter come from the City of Louisville in the State of Kentucky to the Station of Commiskey in the State of Indiana in said car?

24. From where were said two green planks procured?

25. What were the dimensions of said two green planks?

26. Of what kind of wood were said two green planks?

27. Were said two green planks sawed planks?

Prince & McMullens, Att'ys for Deft.

In Circuit Court of Jackson County

[Title omitted]

Demurrer

The defendant demurs to the amended complaint herein and to each paragraph thereof, separately and severally, and for cause of demurrer says that neither of said paragraphs states facts sufficient to constitute a cause of action.

A memorandum in support of said demurrer is hereto attached marked Exhibit "A" and made a part hereof.

Exhibit "A"

1. No facts are alleged showing the authority of the con-
[fol. 69] ductor to employ, order or direct the plaintiff as alleged in the complaint.

2. No facts are alleged which show it to be in the line of duty of the conductor to employ, order or direct the plaintiff as alleged.

3. Facts are not alleged in each of said paragraphs taken separately and severally showing the following items, viz:

a. That said ensilage cutter was shipped from Louisville in the State of Kentucky, to Commiskey, in the State of Indiana, and that said shipment was, therefore, governed by the Federal Law.

b. The presumption under the Federal Law is that said shipment was made under a written contract and no such contract is set out in either paragraph.

c. The plaintiff fails to show that the decedent Guerney O. Burtch did not assume the risk in helping to unload the cutter.

d. The plaintiff fails to show that said decedent was not guilty of contributory negligence in helping to unload the cutter.

e. The complaint shows that the plaintiff's decedent, Guerney O. Burtch, assumed the risk in assisting in the unloading of the cutter.

f. The complaint shows that plaintiff's decedent, Guerney O. Burtch, was guilty of contributory negligence in helping to unload said cutter.

g. The complaint shows that the plaintiff's cause of action is barred by the statute of limitations.

4. Each paragraph shows that the plaintiff's cause of action did not accrue within two years immediately preceding the filing of the amended complaint herein.

5. Each paragraph shows that the plaintiff does not deny assuming the risk of helping to unload the cutter, by said Burtch.

[fol. 70] 6. Each paragraph fails to deny the contributory negligence of said Burtch.

7. Each paragraph shows that decedent Burtch assumed the risk in helping to select the planks and in helping to unload said machine.

8. There is no showing in either paragraph but what this injury was due to the negligence of a fellow servant of said decedent.

9. Each paragraph shows car in which machine was being carried was standing still on a side track and plaintiff's decedent was not engaged in the hazardous operation of railroads.

10. Each paragraph shows this to have been an interstate shipment and it was, therefore governed by the classifications, tariffs and rules filed with the Interstate Commerce Commission and accepted by it as well as by a like

Commission of the State of Indiana; said shipment was therefore governed by the provisions of said rules, etc., providing that shipments of the kind mentioned in the complaint must be unloaded by the consignee. The complaint fails to deny notice of such rules and the law presumes that decedent did have knowledge of the same.

11. Each paragraph shows that decedent could have known of the defect in the timber which broke, by the exercise of reasonable care.

12. Each paragraph shows that the selection of said timber and the placing of the same was one of the details of the work in which decedent was engaged and for which the defendant was not liable.

13. Each paragraph shows that the decedent was guilty of negligence contributing to his injury in the selection of said timber and using the same for the unloading of said timber.

14. If said shipment was of an interstate character, there could be no recovery under the Indiana Employers Liability [fol. 71] Act for the reasons that the amount of recovery is limited to $10,000 under that act and the demand for judgment herein is $30,000 and for the further reason that the Federal Act entirely supersedes the State act in such cases of interstate shipments.

15. The death of Plaintiff's decedent, Guerney O. Burtch, while his own action for damages for the same injuries was pending, caused the action aforesaid to abate and neither paragraph states facts sufficient to show that the action survived to the plaintiff herein.

16. An action by the widow of the decedent Burtch under the facts alleged in the different paragraphs of complaint constitutes a new action and is not a continuation of any action in favor of the decedent Burtch prior to his death.

17. Each paragraph fails to allege that plaintiff's decedent had no knowledge of the defects in the planks mentioned therein.

18. Neither paragraph shows but that each of the two green planks therein mentioned was such a simple instru-

ment that the same could not have been readily seen, examinded and understood by plaintiff's decedent.

Prince & McMullen & McMullen, Attorneys for Defendant.

In Circuit Court of Jackson County

Ruling of Interrogatories

And plaintiff is Ruled to answer interrogatories within twenty days. Comes now the plaintiff and files a motion to strike out interrogatories No. 16-17 and 18, which motions reads as follows, to wit: (here insert) and which motion is now by the court sustained, to which ruling of the court defendant excepts.

In Circuit Court of Jackson County

[Title omitted]

[fol. 72] Order Overruling Demurrer—April 5, 1924

Come again the parties, and the court being sufficiently advised in the premises now overrules defendant's demurrer to each the 1st, 2nd and 3rd paragraphs of amended complaint; to which ruling of the court the defendant at the time excepts. And this cause is now continued generally until the next term of this court.

In Circuit Court of Jackson County

[Title omitted]

Interrogatories to Defendant—Filed May 13, 1924

The plaintiff in the above entitled cause submits and moves the Court to require the defendant through its proper officer or agent to answer under oath, each of the following interrogatories, number- from 1 to 7 inclusive, towit:

No. 1. Was defendant The Baltimore and Ohio Southwestern Railroad Company, on October 24th, 1917, engaged in operating a steam railroad extending through the Town of Commiskey in Jennings County, Indiana?

No. 2. Did defendant on October 24th, 1917, have in its employ and engaged in operating its said railroad in this [fol. 73] state more than five persons?

No. 3. Did defendant's said railroad extend from the City of Louisville in the State of Kentucky to the City of North Vernon in the State of Indiana?

No. 4. Was one Ed. Jackson, on October 24th, 1917, in defendant's employ as a train Conductor in the operation of said road?

No. 5. Was said Ed. Jackson as Conductor in charge of a local freight train operated by defendant through the Town of Commiskey, Indiana, on October 24th, 1917?

No. 6. Was said local freight train run by defendant from the city of Louisville, Kentucky to the City of North Vernon, Indiana, on said date?

No. 7. Was the ensilage cutter by which it is alleged in the complaint that one Guerney O. Burtch was hurt carried by defendant on said local freight train from Louisville, Kentucky to Commiskey, Indiana?

T. M. Hoan, and Montgomery and Montgomery, Attorneys for plaintiff.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

ANSWER

The Baltimore and Ohio Southwestern Railroad Company, defendant, in the above entitled cause for answer to plaintiff's amended complaint herein says that it denies each and every allegation therein made.

[fol. 74] Second Paragraph: For further and second paragraph of answer to plaintiff's amended complaint herein defendant says: That the cause of action sued upon and set out in each paragraph of plaintiff's complaint did not accrue within two years next before the commencement of this action.

Wherefore defendant prays judgment for costs and all proper relief.

Third paragraph: For further and third paragraph of answer to each paragraph of plaintiff's amended complaint, defendant says that plaintiff's decedent died on February 10th 1921 and that so much of plaintiff's cause of action as stated in each of said paragraphs of amended complaint as arises from or is based upon said death did not accrue within two years next before the commencement of this action therefor.

Wherefore defendant prays judgment for costs and all proper relief.

Fourth Paragraph: For further and fourth paragraph of answer to each paragraph of plaintiff's amended complaint, defendant says: That plaintiff's decedent was one of a number of persons owners and consignee of the ensilage cutter described in the amended complaint herein, which had been shipped from Louisville, Kentucky to Commiskey, Indiana, a station on the line of the defendant's railroad, arriving at said last named station on the day of the injury to plaintiff's decedent as alleged in said amended complaint.

That said shipment was made between said stations over the line of defendant on a train of defendant running between said City and points.

That said ensilage cutter was received and shipped by defendant under and in accordance with the usual written contract in force at said time of which plaintiff's decedent had full knowledge.

[fol. 75] That said ensilage cutter was carried by the defendant at less than carload ratings and was very heavy so that the same could not be handled by the regular station and train employees and said station where the unloading facilities of defendant were insufficient for handling said shipment.

That there was in force and effect on said date and long prior thereto a rule and regulation of said defendant, theretofore filed with the Indiana Public Service Commission and the Interstate Commerce Commission, and approved by each, providing that such freight as described in plaintiff's amended complaint and herein, should be unloaded by the owner or owners or consignee thereof.

That said rule and regulation was in full force and effect at the time of the injury of plaintiff's decedent and of which said decedent had full notice and knowledge. That

full compliance with the law requiring the giving of such notice had been rendered by defendant long prior to said injury.

That said rule and regulation has at no time been invalidated, overruled or questioned by this plaintiff or said decedent or any other person or persons whatsoever.

That said Conductor mentioned in plaintiff's complaint had no authority or right to employ plaintiff's decedent in asssisting to unload said ensilage cutter or to in any manner bind the defendant by such alleged employment.

That the plank or skid mentioned in the complaint herein was not the property of nor selected by the defendant or its employees but was selected by the owners of said cutter, including plaintiff's decedent and neither the defendant nor its employees knew of any defect in said skid or plank nor had any means of such knowledge but that the plaintiff's decedent did know of such defect and had full means of knowing the same prior to said injury and prior to the use of said plank.

[fol. 76] McMullen & McMullen and B. Prince, Attorneys for Defendant.

and comes now the defendant and files also a motion to require plaintiff to answer interrogatories heretofore filed and submitted and which motion reads as follows: (Here-insert.)

In Circuit Court of Jackson County

[Title omitted]

Reply—Filed May 16, 1924

The plaintiff for reply to each, the second, third and fourth paragraphs of defendant's answer to the amended complaint, denies every material allegation in each of said paragraphs of answer contained.

Thos. M. Honan, Montgomery & Montgomery, Attorneys for Plaintiff.

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER RE INTERROGATORIES TO PLAINTIFF

And the Court now overruled defendant's motion to require plaintiff to answer interrogatories filed May 12th, 1924, to which ruling of the Court the defendant at the time excepts.

[fol. 77] IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

DEFENDANT'S ANSWERS TO INTERROGATORIES—Filed May 27, 1924

Harry R. McMullen, being duly sworn on his oath says: That he is one of the attorneys for the defendant in the above entitled cause and makes this affidavit for and in behalf of said defendant as such attorney, answering inter-ogatories propounded by plaintiff.

Ans. Int. No. 1. Yes.
S " " 2. Yes.
" " " 3. Yes.
" " " 4. Yes.
" " " 5. Yes.
" " " 6. Yes.
" " " 7. Yes.

Affiant says that each answer above given is true in substance and in fact.

Harry R. McMullen.

Subscribed and sworn to before me May 13, 1924. Cassius W. McMullen, Notary Public. My Commission Expires 11/12/24. (Seal.)

[fol. 78] IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

MOTION TO REJECT PARTS OF AMENDED COMPLAINT AS SHAM

The Baltimore and Ohio Southwestern Railroad Company, defendant in the above entitled cause moves the Court

to strike out and reject as sham each word, line and clause of each paragraph of plaintiff's amended complaint referring to or alleging the death of plaintiff's decedent or alleging or in any way referring to damages on account of the death of said decedent. Said defendant hereby refers to the special written interrogatories heretofore propounded to plaintiff by defendant and the answers of plaintiff thereto and makes the same a part of this motion. Said interrogatories and answers having heretofore been filed in this cause.

Prince and McMullen & McMullen, Attys. for Defendant.

and the Court now overrules said motion and to which ruling of the Court defendant at the time excepts and the defendant now files affidavit and motion for a change of venue from the county; which motion reads as follows:

In Circuit Court of Jackson County

[Title omitted]

Affidavit for Change of Venue

Cassius W. McMullen, being duly sworn on his oath, says that he is attorney for the defendant in the above entitled cause and that he makes this affidavit as such attorney for and in behalf of said defendant.

That an odium attaches to the defendant in said county of Jackson on account of local prejudice which odium affiant says does not exist.

Wherefore the defendant asks that the venue of said cause be changed to some other county.

[fol. 79] Cassius W. McMullen.

Subscribed and sworn to before me this 3rd day of May, 1924. Harry R. McMullen, Notary Public. My Commission expires Oct. 6, 1924. (Seal.)

and which motion is now by the court sustained, and this cause is now sent to Jennings County, Indiana.

Clerk's certificate to foregoing papers omitted in printing.

In Circuit Court of Jennings County

7286

Lula A. Burtch, Admx. of the Estate of Guerney O. Burtch, Deceased,
vs.
The B. & O. S. W. R. R. Co.

Damages

Minute Entries

Oct. 7, 1924.

Come now the parties and by agreement said cause is set for Monday, Oct. 20, 1924, and Jury Requested.

And afterwards towit on the 16th day of October, 1924, the same being the 10th judicial day of the October Term, [fol. 80] 1924, of said Court and the following further proceedings were had in said cause, towit:

[Title omitted]

Come now the parties and said cause is continued until the December Term, 1924.

And afterwards towit on the 16th day of December, 1924, the same being the 2nd Judicial Day of the December Term, [fol. 81] 1924 of said Court and the following further proceedings were had in said cause, towit:

[Title omitted]

Come now the parties and by agreement said cause is set for hearing Monday Dec. 29th, 1924 and requests a Jury.

In Circuit Court of Jennings County

[Title omitted]

Motion to Remand Transcript—Filed Dec. 17, 1924

The defendant in above entitled cause appearing specially for the purposes of this motion and not otherwise,

moves the Court that the alleged transcript and papers filed in this County in said cause be returned to the Clerk of the Jackson Circuit Court for proper certification and correction in the following particulars and each of them separately and severally, towit:

[fol. 82] 1. The transcript does not certify to and identify the original papers in this cause and show that all the papers are transmitted to the Clerk of this Court.

2. The alleged transcript does not certify to all proceedings heretofore had in said cause.

3. The certificate of the Clerk of the Jackson Circuit Court to the alleged transcript is dated July 1, 1924; the transcript was ordered returned to said Clerk by this Court in October, 1924, and said transcript was not returned to this Court until Monday, Oct. 13, 1924.

4. The authority of the plaintiff Lula A. Burtch, Administratrix of the estate of Guerny O. Burtch deceased to be substituted as part plaintiff in this cause is not shown by said transcript.

5. Original papers are not copied in the alleged transcript but the place where they should have been copied is supplied by "here insert."

6. A list of papers or pleadings is inserted in the transcript close to and preceding the certificate of the Clerk of the Jackson Circuit Court but same are not referred to nor identified as a part of the transcript and is evidently inserted at that point through error.

7. The answers of Lula A. Burtch to interrogatories propounded show that there is no such person but that she has since married and has another name, no change having been asked for or granted nor substitution made.

Verbag & McMullens, Attorneys for Defendant.

[fol. 83] In Circuit Court of Jennings County

[Title omitted]

Order Overruling Motion to Remand—Dec. 19, 1924

Come now the parties and the Court having examined said defendant's motion to remand transcript heretofore

filed being fully advised overrules defendant's motion to remand transcript and defendant excepts.

IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted]

MOTION FOR CORRECTION OF ENTRY—Filed Dec. 20, 1924

The Baltimore and Ohio Southwestern Railroad Company, defendant in the above entitled cause appearing special for the purpose of this motion only and not otherwise moves the Court to change, alter and correct the entry in the above entitled cause on December 16, 1924, as shown in Order Book No. 38, at page 487, of said Court, showing that said cause was set for trial by agreement of the parties [fol. 84] on December 29, 1924, by striking out of said entry and expunging from the said record and entry that part of the said entry showing that the parties now come and that said cause was set for trial by agreement of the parties hereto and each of said parts for the reason that the same does not speak the truth.

The affidavits of Harry R. McMullen and Joseph Verbarg are attached hereto, and made a part of this motion, said affidavits being marked respectively Exhibit A & B.

Verbarg and McMullen, Attorneys for Defendant.

[Title omitted]

AFFIDAVIT — JOS. VERBARG

Joseph Verbarg being duly sworn on his oath says:

That he is local Attorney for the defendant in the above entitled cause.

That at no time or place nor with any person did he agree to the above case being set for trial on December 29, 1924.

That he had no knowledge of any entry as to such setting until Wednesday December 17, 1924.

That on the first day of the present term of said Court he was directed by Harry R. McMullen, District Attorney of said defendant to take no step toward an appearance for

defendant in said cause and that he, McMullen, would send affiant a motion for correction of transcript under a special appearance. Said McMullen handed affiant said motion and special appearance on Wednesday, Dec. 17, 1924.

Joseph Verbarg.

[fol. 85] Subscribed and sworn to before me Dec. 20, 1924.

Edward J. Welker. (Seal.)

[Title omitted]

AFFIDAVIT OF HARRY R. MCMULLEN

Harry R. McMullen, being duly sworn on his oath says: That he is now and has been for more than one year last past a member of the firm of McMullen and McMullen, consisting of affiant and one Cassius W. McMullen said firm being engaged during said period in the practice of law in various counties in Indiana, including Jennings County and the Jennings Circuit Court. That said firm and one Joseph Verbarg, a regular practicing attorney in said Jennings County, have had the exclusive charge of the above entitled cause on behalf of the defendant therein, and were and are the only representatives of the said defendant in the Jennings Circuit Court and the only attorneys authorized to act in its behalf.

Affiant is informed and believes that there appears upon the order book of said Court an entry under date of December 16, 1924, to the effect that the parties in the above entitled cause appear and the said cause is by agreement of the parties set for trial December 29, 1924.

Affiant says that neither member of said firm at any time made an agreement that such cause should be tried on said date and is informed and believes that said Joseph Verbarg made no such agreement.

Affiant says that on the first day of the present term of said Court he was present in person in the Court House and Court Room in said County at about 10 o'clock A. M. and was then and there informed that the Judge of said Court [fols. 86 & 87] Honorable John R. Carney, would not hold Court but that he was compelled to be in another County, which information affiant believes to be true but affiant says that said Judge was not present in said Court House or

Court Room at the time of the arrival of affiant nor up to noon of said day.

That neither affiant nor said C. W. McMullen were before said Court or Judge on said day nor did either have any conversation with him or communication with him of any nature, nor has affiant or said C. W. McMullen been before said Court or Judge since said first day of said term of said Court nor has either had any communication with him directly or indirectly.

That affiant desired and intended to enter a special appearance for the purpose of filing and presenting a motion to said Court to return the transcript filed in this cause to the Clerk of the Jackson Circuit Court for correction and other purposes in connection with said transcript.

That affiant on said first day of said term of said Court directed said Verbarg to not enter any appearance and that affiant would prepare and send to said Verbarg a special appearance and motion, which affiant did on the following Wednesday, December 17, 1924. Affiant is informed and believes said motion, under said special appearance, was filed on said Wednesday by said Verbarg, on which said last named date it was discovered that said entry had been made.

Affiant believes that this Court has no jurisdiction of defendant and that the transcript is defective and should be corrected in the interests of Justice to said defendant.

Harry R. McMullen.

Subscribed and sworn to before me December 19, 1924. Thos. C. Carmichal, Notary Public, Dearborn County, Indiana. My Commission expires Jan. 9, 1926. (Seal.)

[fol. 88] In Circuit Court of Jennings County

[Title omitted]

Objections to Motion for Correction of Entry—Filed Dec. 22, 1924

The plaintiff in the above entitled cause objects to defendant's motion to expunge from the court's record an

entry therein to the effect that said cause is set for trial on December 29th 1924 by agreement of parties, and says that the reasons alleged in said motion are untrue, as shown by the affidavit of H. C. Meloy and Edward J. Welker filed herewith and made a part hereof, marked respectively Exhibit A and Exhibit B.

Wherefore plaintiff prays that said motion be denied.

H. C. Meloy, T. M. Honan, and Montgomery & Montgomery, Attorneys for Plaintiff.

Exhibit A

STATE OF INDIANA,
Jennings County, ss:

H. C. Meloy being duly sworn upon his oath says, that he is an attorney practicing at the bar of the Jennings Circuit Court and that on the 15th day of December 1924 he was authorized and directed to appear in said court on [fol. 89] behalf of the plaintiff in the case of Lula A. Carroll as administratrix of the estate of Guerney O. Burtch, deceased, vs. The Baltimore and Ohio Southwestern Railroad Company, then pending in said Court; and that he did appear in said cause after said Court had been opened on said day, and Harry R. McMullen an attorney for defendant in said cause came into the court room at Vernon, Indiana, on said day, and during the temporary absence of the Judge of said Court, affiant then and there proposed to said McMullen as such attorney, that said cause be set for trial on December 22nd, 1924, but said McMullen replied that his brother Cassius was absent in the State of Arkansas and would not return until after Christmas and he wanted his said brother to be present at the trial of said cause and thereupon affiant proposed that the trial be set for December 29th, 1924 to which said McMullen answered saying that will be alright, and affiant replied that he would report the agreement to the court, and upon the court's return later in the day affiant did report to the Honorable John R. Carney, Judge of said Court, the substance of said agreement, and in pursuance thereof said cause was set for trial, and a minute thereof made on the docket of said court.

H. C. Meloy.

Subscribed and sworn to before me this 22nd day of December, 1924. Edward J. Welker, Clerk Jennings Circuit Court. (Seal.)

Exhibit B

STATE OF INDIANA,
Jennings County, ss:

Edward J. Welker being duly sworn on his oath says, that he is Clerk of the Jennings Circuit Court, and that on the 15th day of December, 1924, the Court was duly opened upon the order of the Judge thereof, and that thereafter while said court was open, he was present in the court room, [fol. 90] and during the temporary absence of the judge of said Court, heard the conversation between H. C. Meloy and Harry R. McMullen, detailed in the affidavit of said Meloy filed herewith, and heard said Harry R. McMullen consent and agree with said H. C. Meloy that said cause might be set for trial in said court on December 29th, 1924.

Edward J. Welker.

Subscribed and sworn to before me this 22nd day of December, 1924. John Clerkin, Notary Public. Com. Ex. 6-5-1927. (Seal.)

IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted]

MINUTE ENTRY—Dec. 24, 1924

Come now the parties and said cause is taken from trial docket

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IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR CORRECTION OF ENTRY—Jan. 10, 1925

Come now the parties and the Court overrules defendants motion heretofore filed to correct entry and to expunge

from record the setting of said cause for trial on December 15, 1924 and defendant excepts.

[fol. 91] IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted]

MOTION TO RETURN TRANSCRIPT—Filed Mar. 3, 1925

The defendant in the above entitled cause moves the Court to return *to* alleged transcript and papers filed in the Jennings Circuit Court in said cause to the Clerk of the Jackson Circuit Court for proper certification and correction in the following particulars and each of them separately and severally, to-wit:

1. The transcript does not certify to and identify the original papers in this cause and show that all the papers are transmitted to the Clerk of this Court.

2. The alleged transcript does not certify to all proceedings heretofore had in said cause.

3. The Certificate of the Clerk of the Jackson Circuit Court to the alleged transcript is dated July 1, 1924; the transcript was ordered returned to said Clerk by this Court in October 1924 and said transcript was not returned to the Court until Monday October 13, 1924.

[fol. 92] 4. The authority of the plaintiff, Lula A. Burtch, Administratrix of the estate of Guerney O. Burtch deceased to be substituted as part of plaintiff in this cause is not shown by said transcript.

5. Original papers are not copies in the alleged transcript but the place where they should have been copied is supplied by "here insert."

6. A list of papers of pleadings is inserted in the transcript close to and preceding the certificate of the Clerk of the Jackson Circuit Court, but same are not referred to nor identified as a part of the transcript and is evidently inserted at that point through error.

7. The answers of Lula A. Burtch to interrogatories propounded show that there is no such person but that she has since married and has another name, no change having been asked for or granted nor substitution made.

8. The amended complaint is filed in the same name of Lula A. Carroll, Administratrix vs. The Baltimore and Southwestern Railroad Company.

The transcript shows all pleas and proceedings were had in the Jackson Circuit Court in the name of Lula A. Burtch, administratrix, etc.

No order is shown justifying or explaining this different name.

Verbarg & McMullen, Attys. for Deft.

In Circuit Court of Jennings County

[fol. 93] [Title omitted]

Minute Entry—Mar. 4, 1925

Come now the parties and said cause is set for trial, Monday, March 16, 1925, the 13th judicial day of the March Term, 1925, and Jury requested by plaintiff.

In Circuit Court of Jennings County

[Title omitted]

Order Overruling Motion to Return Transcript—Mar. 7, 1925

The Court having examined defendant's motion to return transcript heretofore filed and being fully advised overruled said motion and defendant excepts.

In Circuit Court of Jennings County

[Title omitted]

Deposition Oliver P. Gothlin Published

Mar. 16, 1925.

Come now the parties and on plaintiff's motion deposition of Oliver P. Gothlin ordered published, which reads as follows:

The deposition of Oliver P. Gothlin, witness produced and sworn to before me, a Notary Public of Marion County,

Indiana, at the law office of Baker & Daniels, in the Fletcher Savings & Trust Building, in the City of Indianapolis, Marion County, State of Indiana, on the 24th day of September, 1924, pursuant to the enclosed notice. This deposition [fol. 94] was taken on the part of the plaintiff in a certain action now pending in the Circuit Court for Jennings County, in the State of Indiana, wherein Lula Carroll, as Administratrix of the estate of Guerney O. Burtch, deceased, is plaintiff, and the Baltimore and Ohio Southwestern Railroad Company is defendant.

The said Oliver P. Gothlin being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Examined by O. H. Montgomery, Attorney for Plaintiff.

Question. State your name, age, and place of residence.

Answer. Oliver P. Gothlin, 71 years of age, 1729 Ashland Avenue, Indianapolis, Indiana.

Question. What has been your profession or business in life?

Answer. For the last 12 years I have been a practicing attorney, but prior to that time I was for many years in the Traffic Department for various railroads; for some years a member of the Railroad Commission of Ohio, and the Public Service Commission of Ohio, *and the Public Service Commission of Ohio,* and from June 30, 1917, to April 1, 1920, I was Attorney Examiner and Chief of the Tariff Bureau for the Public Service Commission of Indiana.

Question. During what period were you connected with the Railroad Commission of the State of Ohio?

Answer. August 1, 1906 to February 1, 1914.

Question. And in what capacity were you employed with that Commission?

Answer. I was a member of the Railroad Commission of Ohio, as it was known, in 1906. In fact it was organized on the 1st of August, 1906, and remained by that title until [fol. 95] the first of July, 1911, when it was changed to Public Service Commission of Ohio, and I was a member of that Commission.

Question. And from 1914 until 1917 what was your occupation?

Answer. Part of that time I practiced law at Columbus, Ohio, and part of the time in Dayton, Ohio, and part of the time I was Director of Traffic for the Chalmers Motor Company in Detroit. My whole practice has been railroad rate manager.

Question. What, if any, experience did you have in connection with the operation of railroads prior to your connection with these Public Service Commissions?

Answer. I began railroading with the Chicago & Northwestern Railroad in 1880, and thereafter was general agent of that company, and later of the Wisconsin Central, being part of the time in Chicago and part of the time in Pittsburgh and part of the time in Cincinnati until 1898, when I became Commercial Traffic Manager in charge of all transportation matters, rates and service for the National Cash Register Company of Dayton, Ohio, in which place I stayed until I was appointed Railroad Commissioner.

Question. You may state, if you know, whether or not the rules and regulations for handling freight between shipper and carrier governing public carriers are in writing.

Answer. Well, they are usually printed. Sometimes they are in some manifold process, mimeographed, or something like that.

[fol. 96] Question. Do you know whether or not in 1917 the rules described by the Interstate Commerce Commission of the United States and by the Public Service Commission of Indiana governing tarriffs and the handling of freight by carriers were printed?

Answer. They were.

Question. Are you acquainted with the rule in the printed tarriffs and regulations of the railroad in the year 1917 known and designated as Rule 8b?

Answer. Yes, sir. Official Classification No. 44, effective February 1, 1917, carried Rule 8b. I personally know that that rule was on file with the Public Service Commission of Indiana at that time.

Question. I will ask you to state if the rule to which you refer was at that time substantially as follows: "Owners are required to load and unload heavy or bulky freight, carried at L. C. L. ratings, and that cannot be handled by the regular station employees or at stations where the carrier's loading and unloading facilities are not sufficient for handling."

Answer. As you have read it, it is correct.

Question. You may state, if you know, whether or not at that time the rule was in the same language as was found in the regulations promulgated by the Interstate Commerce Commission as well as by the Public Service Commission of Indiana.

Answer. Yes, identically the same.

Question. You may state, if you know, what the general practice of carriers of freight was in October, 1917, with reference to the disposition of cars or bulky shipments on [fol. 97] their arrival at the point of destination with regard to unloading the same when coming within this Rule 8b.

Answer. The car containing such freight was placed at the nearest convenient siding accessible, and the consignee notified to unload on the siding.

Question. You may cross-examine him.

Cross-examined by Harry R. McMullen, for the defendant:

Question. You are practicing law where, Mr. Gothlin?

Answer. I am not practicing at the present time. Have not been since last February.

Question. I understood you to say something to the effect that for 12 years last past you have been a practicing attorney.

Answer. I am a member of the Bar, but I have not been practicing since February last.

Question. Prior to that time you had been a practicing attorney for how long?

Answer. From June, 1912.

Question. Practicing where?

Answer. Well, the situation is like this: While I was a member of the Railroad Commission of Ohio I learned that some knowledge of law was essential, and I took a night course for 5 years, and was admitted to the Bar, as I stated, by the Supreme Court of Ohio, on the 20th day of June, 1912. I was still at that time a member of the Commission, and I used what legal knowledge I had acquired in discharging the duties of that position. After I left the Commission I opened an office and practiced in Columbus, and remained there for a year, or such a matter, and moved

[fol. 98] to Dayton, Ohio, and practiced there for about 2 years. Then I was called to Detroit, as Director of Traffic for Chalmers and remained there until I was called by the Commission of Indiana as a sort of advisor, and made attorney examiner and chief of the Tariff Bureau. Early in April, 1920, I resigned my position with the Commission, and moved back to Dayton and opened an office there, and remained there about 15 months. Then I came back to Indianapolis and had an office for a while in the Peoples Bank Building until I resumed work again with the Public Service Commission as manager of their Interstate Bureau, which was in January, 1922, and I remained in that position until April, 1923, when I associated myself with Isaac Born, who has an office in the Occidental Building, and remained with him until last February, when I had a sort of a nervous breakdown.

Question. Rule 8b, to which you have referred, is a rule that is printed?

Answer. Yes, sir.

Question. And is that adopted or ordered by the Interstate Commerce Commission?

Answer. The Indiana, you say?

Question. The Interstate.

Answer. That rule is not exactly in effect now. The classification has been changed, but at the time the classification was published by what is called a Classification Committee for all the railroads in official classification territory, of which the Baltimore and Ohio was a member, and it was filed with the Interstate Commerce Commission, and thereby received their approval.

[fol. 99] Question. Now, when was that changed, as you suggest, and was not further in force?

Answer. Well, the Consolidated Classification No. 3 took effect November 15, 1922, and what was Rule 8 in the official classification is Rule 27 in the consolidated classification. Consolidated Classification No. 1, I think, took effect in 1919, when they changed from the separate classification to the consolidated.

Question. How long before 1919 had Rule 8b been in force?

Answer. Well, official classification No. 44 took effect on February 1, 1917. My memory is, though I have not looked

it up recently, that the same rule had been in effect a number of years.

Question. Then it was in effect—Rule 8b—with the sanction of the Interstate Commerce Commission from February of 1917 up until the year 1919?

Answer. Yes, sir.

Question. You spoke to Mr. Montgomery about L. C. L. rates. What do you mean by that, Mr. Gothlin?

Answer. Those are the initials in the printed rules which stand for less car load ratings.

Question. You mean, in other words, L. C. L. as used in this Classification 44 means less than car load lots?

Answer. Yes, sir, and is rates at which the shipper may be allowed to charge at less than car load lots.

Question. The railroad may be allowed to charge?

Answer. Yes, sir.

Question. Was this also sanctioned by the Indiana authorities, and in force in Indiana from February, 1917, up until at least the year 1919?

Answer. Yes, sir. By the filing of the classification with [fol. 100] the Public Service Commission of Indiana.

Question. Do you remember when at Brownstown, the last time we tried this case, of a certified copy of Classification 44 being there?

Answer. Yes, sir.

Question. You certified that yourself, did you not?

Answer. Yes, sir.

Question. And is that the same that you copied from?

Answer. Well, it is an exact duplication of it. We have one copy on file—official copy—with the Public Service Commission, and this other was certified to as being an exact copy of that.

Oliver P. Gothlin.

STATE OF INDIANA,
County of Marion, ss:

I, William W. Seagle, a Notary Public within and for said County, hereby certify that the above Oliver P. Gothlin was by me first duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, relating to said cause; that his deposition was reduced to writing by Mrs. G. G. Meyer a disinterested person, in my presence and under my direction, and that the said The Baltimore

and Ohio Southwestern Railroad Company attended by Harry R. McMullen, its attorney, and said deposition was taken at the law office of Baker & Daniels, in the Fletcher Savings & Trust Building, in the City of Indianapolis, County of Marion, and State of Indiana, on the 24th day of September, 1924, between the hours of 11 o'clock A. M. and 1 o'clock P. M. of said day.

In witness whereof, I have hereunto set my hand and Notarial Seal, this 24th day of September, 1924.

William W. Seagle. (Seal.) My Commission expires September 23, 1926.

[fol. 101] The costs of this deposition in the sum of $10.00 have been paid by the plaintiff.

Wm. W. Seagle.

In Circuit Court of Jennings County

(Title omitted)

The defendant in the above entitled cause is hereby notified that on the 24th day of September, 1924, at the Law Office of Baker & Daniels, Room No. 803, Fletcher Trust Building, in the City of Indianapolis in the City of Marion and State of Indiana, between the hours of 8 o'clock A. M. and 6 o'clock P. M., of said day, before some officer authorized to take depositions the Plaintiff will proceed to take the deposition of O. P. Gothlin witness, to be used in evidence on the trial of said cause, and will, if necessary, continue said taking from day to day until said depositions are completed.

Dated this 16th day of September, 1924.

Montgomery & Montgomery, Attorney- for Plaintiff.

We acknowledge service of the above notice, and waive dedimus and Certificate of Official character of officer before whom said depositions are taken, this 16th day of September, 1924.

Jos. W. Verbarg, Attorney for Defendant.

and now the jury being called and sworn for excuses and to answer questions and to try cause, said cause is now submitted to the following July, to wit: Frank O. Streit,

[fol. 102] Ira Corya, Edgar E. James, Lester Boyd, George Kipper, Alonzo Jordon, Willard Milholland, James A. Jackson, L. E. Biedert, H. E. Small, Orva M. Davis, John Whitcomb.

In Circuit Court of Jennings County

[Title omitted]

Minute Entries

The defendant respectfully moves the Court that the Jury be sent to Commiskey, Indiana, to view the scene of the alleged injury of plaintiff's decedent herein and that the Court give the Jury proper instructions as to its conduct during said visit.

Verbarg & McMullens, Attys. for Defendant.

And said Jury was ordered by the Court in control of the Sheriff to view the scene of accident, Tuesday Morning, March 17, 1925. And now the plaintiff proceeds with the evidence and the evidence not being concluded Court adjourned until tomorrow morning at nine o'clock.

[Title omitted]

March 17, 1924.

Come now the parties and comes also the Jury and evi-
[fol. 103] dence on behalf of Plaintiff given and evidence not concluded the Court admonished the Jury and Court adjourned until tomorrow morning at nine o'clock, March 18, 1925.

[Title omitted]

March 18, 1925.

Come now the parties and comes also the Jury and said trial resumed and evidence on behalf of plaintiff concluded plaintiff rests and now evidence on behalf of defendant given, Plaintiff offers evidence on rebuttal, and plaintiff rests and evidence now concluded.

In Circuit Court of Jennings County

[Title omitted]

Motion for Interrogatories to Jury

The defendant respectfully moves the Court to require the Jury trying the above entitled cause to answer the [fol. 104] following interrogatories, and each of them, and return these interrogatories with the answers thereto into open court with their general verdict, if they agree upon a verdict.

Verbarg, McMullen & McMullen, Attys. for Deft.

1. What was the date of the death of plaintiff's decedent, Guerney O. Burtch?
2. What is the date of the injury which it is claimed caused the death of said Guerney O. Burtch?
3. Did not the plaintiff herein file her amended complaint in this cause on March 5, 1924?
4. Was not the amended complaint mentioned in Interrogatory #3 the first complaint filed by said Lula Carroll, as administratrix of the state of said Guerney O. Burtch?
5. Was not said administratrix duly appointed administratrix of the estate of said Guerney O. Burtch, deceased, on the 14th day of February, 1921, and thereupon duly qualified and has been since said date and is now acting as said administratrix?
6. Was not the injury on which plaintiff bases her action herein the same injury for which said Guerney O. Burtch sued in his life time and recovered judgment in the Jackson Circuit Court of Indiana, which judgment was thereafter affirmed by the Supreme Court of Indiana and then reversed by the Supreme Court of the United States?
7. Was not said Guerney O. Burtch over the age of twenty-one years at the time of the alleged injury?
8. Was not said Burtch a resident of Jennings County, Indiana, at the time of the alleged injury?
9. Did not said Guerney O. Burtch continue to reside in said Jennings County, Indiana, from the date of the alleged injury until the date of his death?

[fol. 105] 10. Was not said alleged injury received in Jennings County, Indiana.

11. Did not the ensilage cutter mentioned in the complaint come from Louisville, in the State of Kentucky, to Commiskey, Jennings County, Indiana, in a local freight train operated by the defendant.

12. Was not the car in which said ensilage cutter was being carried standing still on a side track at said station of Commiskey at the time said injury is claimed to have been received?

13. Was not said injury caused by the breaking of a plank on which said machine was being unloaded from said freight car?

14. Were not the two planks on which it was attempted to unload said machine brought from a sawmill nearby by said decedent Guerney O. Burtch and Granville Arbuckle?

15. Were not said planks each about ten or twelve feet long and 3½ inches wide by 5 inches thick?

16. If you answer Interrogatory 15 "No" give the dimensions of each of said planks.

17. Were not said planks green poplar?

18. Were not said planks selected by said Burtch and said Arbuckle?

19. If you answer Interrogatory #18 "No," then state who did select said planks.

20. Did either of said planks show any defects apparent to said decedent Burtch or said Arbuckle at the time of the selection of said planks by said two men?

21. Did either of said planks show any defects apparent to said decedent Burtch or said Arbuckle from the time of the selection of said planks by said two men up to the time of the happening of the alleged injury?

22. If you answer either Interrogatory #20 or #21 in the affirmative, then state what those defects were.

23. Was the defect in the plank the cause of it breaking?

[fol. 106] 24. Was the defect which caused the plank to break apparent to any of those who examined same before the happening of the alleged injury?

25. Was not the defect which caused the plank to break one which could not have been discovered by the naked eye prior to the happening of the alleged injury?

26. Did not the alleged injury to plaintiff's decedent occur October 24, 1917 near 4 P. M.?

27. Was not the decedent Guerney O. Burtch, possessed of good eyesight on said last named date prior to the accident?

28. Had not the decedent farmed all his life?

29. Was not said Granville Arbuckle a farmer for several years prior to the accident to the decedent?

30. Was not said Burtch one of the purchasers of said ensilage cutter.

31. Was not said Burtch on said station platform prior to said injury to obtain said machine as one of the owners thereof?

32. Was said Burtch an employee of the defendant at the time of the injury as alleged or immediately prior thereto?

33. If you answer Interrogatory No. 32, "Yes" then state what his pay was.

34. If you answer Interrogatory No. 32 "Yes" then state what the terms of his contract were and who hired him and whether he was hired by the day, hour, or other period of time.

35. Did said conductor assist in the unloading of said machine?

36. If you answer Interrogatory No. 35 "Yes" state how he helped.

37. Was it not daylight at the time of the alleged injury and for several hours immediately preceding said injury?

38. What, if anything, prevented the decedent, Guerney O. Burtch, from discovering the defect in said plank?

39. Was decedent Burtch engaged in unloading the said ensilage cutter from the car at the time the plank broke and he was injured?

[fol. 107] 40. Was not decedent of sound mind and under no legal disability at the time he was injured and did he not continue so until his death?

41. How far from where planks were gotten to car in which ensilage cutter was?

42. Did conductor Jackson go into saw mill with Arbuckle and decedent to get planks?

43. Did either of said planks show any defects to Arbuckle or decedent at the time they got the planks at the saw mill?

44. What defect or defects were apparent in the planks at the saw mill that could not have been discovered by the use of ordinary care?

45. What was the defect in the plank that caused it to break?

46. Was the defect that caused the plank to break one that could have been discovered by Arbuckle or decedent if they had examined the same with ordinary care at the saw mill or on the way to the car or at the car at any time before said plank broke?

47. Did decedent make any examination of plank which broke before the same was brought to car to be used?

48. Was the ensilage attempted to be unloaded over the spur track with the consent of Burtch and Arbuckle?

49. Did said decedent assist in unloading other freight from said car before said cutter was attempted to be removed?

50. Did decedent assist in moving said cutter to the door of the car on the day he was injured?

51. Did said decedent know said cutter was very heavy before the same was placed upon the planks for removal from the car?

52. Did the car in which said cutter was brought to Commiskey, Indiana, have freight for other points beyond and east of Commiskey?

53. Did said car come in said train from Louisville, Kentucky, to Commiskey?

[fol. 108] 54. Did said cutter come to said Commiskey in said car from Louisville, Kentucky?

55. Is said Commiskey in the State of Indiana?

56. Was there in full force and effect at the time of plaintiff's alleged injury, an official classification of rates, rules, regulations and tariffs?

57. Was the official classification of rates, rules, tariffs and regulations that was in force and effect on the road of defendant at the time of plaintiff's alleged injury known as "Official Classification No. 44"?

58. Had said "Official Classification No. 44" been filed with the Public Service Commission on December 14, 1916?

59. Had said "Official Classification No. 44" been filed with Interstate Commerce Commission on December 12, 1916?

60. Was there not in full force and effect at the time plaintiff was injured and it being one of the rules and regulations included in said "Official Classification No. 44" on page 30 thereof, the following viz:

"Owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings that cannot be handled — the regular station employees, or at stations where the carriers' loading or unloading facilities are not sufficient for handling?"

61. Do not the letters quoted above "L. C. L." stand for the words "Less than Car Load Lots"?

62. Was plaintiff an employee of defendant at the time he was injured?

63. If plaintiff was an employee by whom and when was he employed?

64. Did not plaintiff have as good an opportunity to see, examine and know of the condition of said timbers as the defendant or any of its employees?

65. Was the defect in said plank such a defect as could have been discovered by either Arbuckle, decedent or Con-
[fol. 109] ductor Jackson by the use of ordinary care?

66. Was the plank sufficient for the purpose for which it was brought to the car in the judgment of said Arbuckle and decedent?

67. Was decedent a farmer and familiar with moving heavy objects and familiar with timber?

IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS

The defendant in the above entitled cause, the Baltimore and Ohio Southwestern Railroad Company, now before the commencement of the argument of said cause to the jury, requests the Court to give to the Jury trying the same each of the following instructions numbered one to 38 both inclusive, towit:

#1. The burden of proving plaintiff's complaint as made rests on the plaintiff and if you find from all the evidence that the injury to plaintiff was caused in some other manner your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

#2. Plaintiff alleges in her first and third paragraphs of amended complaint that an emergency arose requiring the action of the conductor in calling for assistance. In determining whether the evidence shows that such an emergency exists you must take this word in its true mean- [fol. 110] ing which is a crisis, exigency, pinch, strait or necessity.

If you find from the evidence in the cause that no emergency arose in this case within the meaning as above outlined your verdict must be for the defendant upon each of said paragraphs. (Given. J. R. Carney, Judge.)

#3. An emergency arises when there are such circumstances and conditions present that one is compelled to, act in a certain manner from which there is no escape or choice to the contrary and unless the evidence in this case shows by a fair preponderance that the conductor mentioned in the complaint herein acted under such circumstances, conditions, and under such compulsion, you must find for the defendant upon the first and third paragraphs of plaintiff's amended complaint. (Given. J. R. Carney, Judge.)

#4. A conductor of a local freight train cannot ordinarily hire persons and bind his employer to such an extent that such employer becomes liable for injuries to such a one so hired. (Given. J. R. Carney, Judge.)

#5. If you find from the evidence that defendant had provided ways and means for unloading the ensilage cutter at the station of Commiskey, but, that he failed to use the same and plaintiff's decedent was thereby injured, the plaintiff cannot recover under the first or second paragraph of her amended complaint. (Given. J. R. Carney, Judge.)

#6. If you find that the ensilage cutter mentioned in the amended complaint had been shipped from the city of Louisville, Kentucky to Commiskey, Indiana, on the local freight train mentioned in said amended complaint, I charge you this was an interstate shipment and said train and

employees were engaged in interstate commerce and the relations of employees and defendant were governed by the Federal Law and not the law of Indiana. (Given. J. R. Carney, Judge.)

[fol. 111] #7. If you find that the ensilage cutter mentioned in plaintiff's amended complaint was received by defendant at Louisville, Kentucky, and was shipped by it on the train mentioned in said amended complaint to the Station of Commiskey in the State of Indiana, I charge you that this was an interstate shipment and that said train and its employees, including plaintiff's decedent, Guerney O. Burtch, if you find he was an employee, at the time said decedent was injured, were engaged in interstate commerce and governed by the Federal Law and your finding upon the first and second paragraphs must be for the defendant (Given. J. R. Carney, Judge.)

#8. If you find that plaintiff's decedent was engaged in interstate commerce at the time he received his injuries, your verdict must be for the defendant on the first and second paragraphs of plaintiff's amended complaint. (Given. J. R. Carney, Judge.)

#9. If you find from the evidence that plaintiff's decedent at the time he received his injury complained of, was engaged in interstate commerce as I have heretofore defined such service, and that at any time before he so received said injury, he knew that the plank mentioned in the amended complaint herein, was weak or of insufficient strength to support the wright of the ensilage cutter and was liable to break or if by the exercise of ordinary care he could have known the same, your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

#10. If you find from the evidence that plaintiff's decedent at the time he received the injury complained of, was engaged in interstate commerce as I have heretofore defined such service, and that at any time before he so received said injury, he could have learned that said plank was defective, weak and liable to break, your verdict must be for the defendant. (Refused. J. R. Carney, Judge.)

#11. If you find that at the time plaintiff's decedent was [fol. 112] injured he was engaged in interstate commerce, as I have defined the same, and that he had equal oppor-

tunity with the defendant to know the condition of said plank, your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

#12. If you find that a defect existed in the plank which made it dangerous and that the injury and death of plaintiff's decedent, was caused by such defect but the defect was — known by said decedent or defendant nor could not have been known by the use of ordinary care of either party because the said defect was of such a hidden character, then there is no liability for such defect and your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

#13. If you find that at the time plaintiff's decedent was injured he was engaged in interstate commerce, as I have heretofore defined the same to be, and you further find that the injury to and death of plaintiff's decedent was caused by a defect in a plank but that the defect was not known by either said decedent or said defendant and was of such a hidden character as not to be discovered by the exercise of ordinary care, then there is no liability for such defect and your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

#14. It is not every accident that entitles the injured person to recover damages. If the injury was one that could not have been anticipated or guarded against in the exercise of ordinary care by the employer, defendant, there can be no recovery. So, in this case, if you find that the injury to plaintiff's decedent, for which she has brought this suit, was one which the defendant in the exercise of ordinary and reasonable care, could not have anticipated or guarded against, then she will not be entitled to recover in this action. (Given. J. R. Carney, Judge.)

#15. If you find from a fair preponderance of the evidence that the ensilage cutter mentioned in the plaintiff's amended complaint was received by the defendant at the [fol. 113] City of Louisville, State of Kentucky, to be by it shipped and it was by it shipped from said city, to the station of Commiskey, in the State of Indiana, on its local freight train mentioned in said complaint and that when said train arrived at said station, an emergency arose for the employment of said decedent to assist in unloading said

ensilage cutter and that the conductor thereupon hired said decedent and directed said decedent and one other to procure heavy timbers with which to unload said cutter and that said decedent and one other went to a nearby saw mill and procured two planks as directed and brought them to the car from which said cutter was to be unloaded and that said planks were then and there placed against said car and the said cutter was moved upon said planks when one of said planks by reason of its insufficiency broke, allowing the said cutter to fall upon and injure said decedent and you further find that the insufficiency of said plank was known or could have been known to said decedent by the exercise of ordinary care, plaintiff cannot recover in this case as said decedent assumed the risk. (Given. J. R. Carney, Judge.)

#16. It is the duty of an employee to use reasonable care in examining his surroundings and simple tools with which he is engaged and if there is any defect or hazard therein which is as equally open to his observation as to that of his employer, he cannot hold his employer liable for any injury caused by such defect or hazard, for he must be deemed in such case, to have assumed the risk, if — makes no objection, or has negligently failed to observe such defect or hazard. If, therefore, you believe from the evidence that decedent had equal means with defendant of observing the defect or hazard, if any there was, that causes his injury, then your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

#17. When an employee engages in the employment of an employer, in interstate commerce, he thereby assumes [fol. 114] all risks of injury as are incidental and necessarily attend and attach to the kind of work for which he was employed. He assumes also all such dangers and risks as are open, obvious and apparent, or which by the exercise of reasonable or ordinary care he could have known. The meaning of this doctrine of assumption of risk amounts to this: that when an employee engages in an employment which is necessarily attended with some risk or danger, or if while he is engaged in such employment he becomes aware of danger or risks, although not incident to the employment in which he is engaged; or that such dan-

gers or risks are so apparent that he in the use of ordinary care ought to observe and know them and with such knowledge or means of knowled*be*, he continues in his work and is injured by reason of such risks or dangers, for such injuries he is not entitled to recover. (Given. J. R. Carney, Judge.)

#18. If an employee engages with an employer to do work of a certain kind or character, which work requires the employee to engage in interstate commerce, as I have heretofore defined the same, the rule of law is that the employee assumes the risk and the dangers which are naturally incident to the work to be accomplished; and the burden is upon the plaintiff in this case to prove by a fair preponderance of the evidence that the injury *received her decedent* and of which she complains, was not the result of a risk assumed by said decedent in the business in which he was engaged. If you find from the evidence that the injury complained of herein was due to a risk assumed by decedent as incident to decedent's employment then she, plaintiff, is not entitled to, recover in this action, and your verdict should be for the defendant. (Given. J. R. Carney, Judge.)

#19. An employee engaged in interstate commerce is not required to search for defects or critically inspect appliances, but he is charged with the duty of exercising ordinary care in observing tools and appliances and also with [fol. 115] the usual knowledge and judgment as to the familiar laws of nature and the probable strength of materials with which he is familiar, and he assumes the risks arising from such dangers as such care, knowledge and judgment make him acquainted. (Given. J. R. Carney, Judge.)

#20. In case you find for the plaintiff, you will then inquire as to the amount of damages she may be entitled to. In fixing such damages you may consider the age, health and earning capacity of said Guerney O. Burtch, as shown by the evidence; and fix the amount of damages as you believe will be a fair pecuniary compensation to her and his children. But you cannot take into consideration the mental suffering or grief of survivors or loss of domestic

or social happiness on their part. (Given. J. R. Carney, Judge.)

#21. In case you find for the plaintiff it will then be your duty to fix the amount of your verdict. In arriving at this amount you should fix the damages at that sum which rep-sents the present cash value of the reasonable expectation of pecuniary advantage to the widow of decedent during his life and the pecuniary advantage to said infant children while dependent and until they become twenty-one years of age. (Given. J. R. Carney, Judge.)

No. 22. In case you find that decedent was not an employee but assisted in the unloading of said cutter in the way and manner and under the conditions as set forth in the second paragraph *fo* amended complaint and you further find that decedent was *b*uilty of negligence contributing to his injury in any degree your verdict must be for the defendant on the second paragraph. (Given, J. R. Carney, Judge.)

No. 23. If you find from a fair preponderance of the evidence that said decedent assisted in the unloading of [fol. 116] said cutter in the way and manner and under the condition as set forth in the second paragraph of amended complaint and you further find that said decedent was injured by the breaking of the plank, which breaking was caused by a defect therein, and you find that said decedent knew or by the use of ordinary care could have known of said defect before receiving said injury, your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

No. 24. If you find that decedent was assisting in the unloading of said cutter under the terms and conditions as set forth in the second paragraph of the amended complaint herein and was injured while so employed by a defect in the plank, if you also find that said decedent had equal opportunity of discovering said defect with the defendant, your verdict must be for the defendant on said second paragraph. (Given. J. R. Carney, Judge.)

No. 25. If you find that the decedent Guerney O. Burtch died two years or more before the filing of the amended complaint, I instruct you that the cause of action as set forth in the first paragraph of amended complaint is barred

by the Statute of Limitations of the State of Indiana and your verdict must be for the defendant. (Given. J. R. Carney, Judge.)

No. 26. If you find that the decedent Guerney O. Burtch died two years or more before the filing of the amended complaint, I instruct you that the cause of action as set forth in the second paragraph of amended complaint is barred by the statute of limitations of the State of Indiana, and your verdict must be for the defendant. (Refused. J. R. Carney, Judge.)

No. 27. If you find that the decedent Guerney O. Burtch died two years or more before the filing of the amended [fol. 117] complaint, I instruct you that the cause of action as set forth in the third paragraph of amended complaint is barred by the Statute of Limitations of the State of Indiana and your verdict must be for the defendant. (Refused. J. R. Carney, Judge.)

No. 28. If you find that the decedent Burtch recovered judgment for the same injuries which afterwards resulted in his death and that while said former action was pending on appeal said Burtch died, I charge you that said action abated with his death and your verdict must be for the defendant. (Refused. J. R. Carney, Judge.)

No. 29. If you find that decedent Burtch was requested to perform the work he did do by some employee, he cannot recover under the second paragraph as he was a mere volunteer. (Given. J. R. Carney, Judge.)

No. 30. The care required of the defendant and plaintiff is equal and before you can find for the plaintiff, you must find from a preponderance of the evidence that the defendant knew of the defect in time to have prevented the accident or by the use of ordinary care could have known but the defendant can not be held to be negligent, because of negligence, if any, on the part of the decedent Burtch. (Given.)

No. 31. If you find that the ensilage cutter mentioned in plaintiff's amended complaint was received by defendant at Louisville, Kentucky, and was shipped by it on the train mentioned in said amended complant to the Station of Commiskey in the State of Indiana, I charge you that this

was an interstate shipment and that said train and its employees, including plaintiff's decedent, Guerney O. Burtch, if you find he was an employee, at the time said dece-
[fol. 118] dent was injured, were engaged in interstate commerce and governed — the Federal Law and your finding upon the first paragraph of amended complaint must be for the defendant. (Refused J. R. Carney, Judge.)

No. 32. If you find that plaintiff's decedent was engaged in interstate commerce at the time he received his injuries, your verdict must be for the defendant on the first paragraph of plaintiff's amended complaint. (Refused. J. R. Carney, Judge.)

No. 33. If you find for the plaintiff on the first paragraph of her complaint it will be your duty to assess the damages which cannot exceed the sum of $10,000.00. (Refused. J. R. Carney, Judge.)

No. 34. If you find for the plaintiff on the 2nd paragraph of her complaint, it will be your duty to assess the damages which cannot exceed the sum of $10,000.00. (Refused. J. R. Carney, Judge.)

No. 35. The first paragraph of complaint is based on the law of the State of Indiana and the plaintiff must prove by a fair preponderance of the evidence, that the defendant was negligent as alleged in the complaint and that the negligence was the proximate cause of such injuries, also that Burtch himself was not negligent in doing the work alleged even if you find that he had been ordered to do the work by one authorized to employ him by virtue of an emergency or urgent necessity. (Refused. J. R. Carney, Judge.)

No. 36. In determining the degree or kind of care required of employees in use of tools in their work, I instruct you that he assume the consequences from such defects as are patent, and such as, by the exercise of ordinary diligence, and giving proper heed to the things that surround him, he would discover. (Given. J. R. Carney, judge.)

[fol. 119] No. 37. If you find for the plaintiff on her 3rd paragraph of complaint and you also find the decedent was guilty of contributory negligence, the amount of the dam-

ages, if any, must be reduced in proportion to such contributory negligence. (Given. (J. R. Carney, Judge.)

No. 38. The plaintiff alleges a custom or practice prevailing at Commiskey in that trainment called on bystanders for assistance in unloading heavy freight from trains and the burden is on the plaintiff to prove such custom or practice by a fair preponderance of the evidence either by showing that the defendant company knew of such practice or that such practice was so general and so long continued that the defendant should have known it. (Given. J. R. Carney, Judge.)

Verbarg, McMullen & McMullen, Attys. for Deft.

The court refused to give to the jury instructions Nos. 10, 25, 26, 27, 28, 31, 32, 33, 34, 35, above requested by Defendant and the defendant at the time excepted to the refusal of the Court to give to said Jury each of said instructions and the Court gave No. 1 to 9 both inclusive and 11 to 24, both inclusive, 29, 30, 36, 37 and 38.

McMullen & McMullen, Attys. for Deft. John R. Carney, Judge.

March 19, 1925

[fol. 120] In Circuit Court of Jennings County

[Title omitted]

Plaintiff's Requested Instructions

The plaintiff, Lula A. Carroll, as Administratrix of the estate of Guerney O. Burtch, deceased, now before the commencement of argument in this case, requests the court to give to the jury each of the following instructions numbered from 1 to 16 including 8½ inclusive, to-wit:

Given. J. R. Carney, Judge.

No. 1. It appears from the evidence without conflict that the ensilage cutter by which plaintiff's decedent Guerney O. Burtch, was injured, was not carried by defendant from one point to another within this state, but was carried from the city of Louisville in the State of Kentucky to the Town of Commiskey in the State of Indiana, in inter-state com-

merce, and you will, therefore, disregard the first paragraph of plaintiff's complaint.

Given. J. R. Carney, Judge.

No. 2. If you find from the evidence that upon the arrival of defendant's local freight train at the Station of Commiskey, Indiana, on October 24, 1917, carrying the ensilage cutter, as alleged in the complaint herein, such machine was so heavy as to make it unsafe for the regular crew upon said train and at said station in defendant's employ at the time, to attempt to unload the same, and that an emergency existed authorizing the conductor in charge of said train to call to his aid additional assistance, and if, in these circumstances, the conductor acting in the line of his duty and on behalf of defendant requested by-standers, including plaintiff's decedent, Guerney O. Burtch, to assist in unloading said machine, and in response to said re-[fol. 121] quest said Burtch did undertake to assist in said work, then defendant owed him while so engaged the same duty of care that it owed to a laborer regularly in its employ while engaged in the same or similar work, and said Burtch was, while so working an employee of defendant's although not expecting compensation.

Given. J. R. Carney, Judge.

No. 3. It is the duty of an employer to provde and furnish reasonably safe and suitable tools and applicances for the use of the employee in performing his duties; and it is the duty of the employer to make proper inspection to see that such tools and applianccs are sound and safe for the use intended, and for any negligent failure or omission in the performance of such duty the employer will be liable for damages resulting therefrom to an employee injured, without fault on his part.

Given. J. R. Carney, Judge.

No. 4. An employer cannot relieve himself of the duty to provide a reasonably safe place in which to work and reasonably safe appliances and tools with which his employees are to perform their labor by delegating such duty to another.

Given. J. R. Carney, Judge.

No. 5. If you find that before the day upon which he was injured plaintiff's decedent Guerney O. Burtch, with others,

had ordered, or, with local dealer had contracted for, the ensilage cutter by which he was injured, and at that time came upon defendant's right of way with its knowledge and consent because of his interest in said cutter, then he was not a trespasser, and defendant was bound to exercise ordinary care for his safety while so upon its right of way, and would be liable for any injury sustained by him because of any act of negligence or failure to use ordinary care on the part of defendant alleged in the second paragraph of plaintiff's complaint, to which the carelessness of said Burtch did not contribute.

[fol. 122] Given. By J. R. Carney, Judge.

No. 6. If you find that Guerney O. Burtch had a valid claim for personal injuries sustained upon the allegations of negligence charged in the second paragraph of complaint and obtained judgment for the same against defendant after a trial in the Jackson Circuit Court of Jackson County, Indiana, from which judgment defendant appealed to the Supreme Court of Indiana, and that such judgment was reversed by said court and a new trial granted to defendant thereon, and that said Guerney O. Burtch pending said appeal, died, and before a new trial after such reversal could be had, then you are instructed that such claim of said Guerney O. Burtch for personal injuries survived his death and is properly prosecuted in this action by the plaintiff as his administratrix. (Section 286, Burns 1914)

Given. J. R. Carney, Judge.

No. 7. You are instructed that if on the 24th day of October, 1917, the defendant was a common carrier by railroad and engaged in commerce between any of the several states or territories of the United States, it was under the Federal Employers Liability Act liable in damages to any person suffering injury while he was employed by it as such carrier in such commerce, and in case of his death to his administrator for the benefit of his surviving widow and children, if any, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or because of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

Given. J. R. Carney, Judge.

No. 8. If you find from the evidence that on October 24, 1917, the defendant was a common carrier by railroad and engaged in commerce between the states of Kentucky and Indiana and *and* that as such carrier it transported an en- [fol. 123] silage cutter in *w*uch commerce from the City of Louisville in the State of Kentucky to the town of Comminskey in the State of Indiana, and there undertook to unload the same and for that purpose called into its service Guerney O. Burtch as alleged in the complaint, then while so employed in assisting in unloading said machine said Burtch also was engaged in interstate commerce, and defendant would be liable to him for any injury suffered while so employed and in case of his death, to his administrator for any such injury or death, as resulted in whole or in part from the negligence of any of the officers, agents or employees of defendant as such carrier, or by reason of any defect or insufficiency due to its negligence in its appliances or equipment as charged in the third paragraph of the complaint, then it would be liable in this action, unless you find that said Burtch assumed the risk of such injuries.

Given. J. R. Carney, Judge.

No. 8½. Assumption of the risk, if established, would constitute a defense to this action; but Guerney O. Burtch would not be chargeable with having assumed the risk in this case, unless you find from the evidence that at and before the time of receiving his injuries as alleged in the complaint, he knew and appreciated the hazards and dangers to which he was about to be exposed and from which he was injured, and with full knowledge of such dangers and probable consequences he voluntarily encountered the same, when a person of ordinary prudence would not have done so.

Given. J. R. Carney, Judge.

No. 9. If you find from the evidence that said Guerney O. Burtch was injured as alleged in the third paragraph of complaint herein, and had a cause of action therefor against defendant under the law as shown in the last instruction above, and that on about the 10th day of February 1921, [fol. 124] while suit therefore was pending on appeal, he died, then you are instructed that said cause of action did not abate with his death, but survived, and the plaintiff

herein, as his administratrix, may recover such sum in damages as he would have been entitled to, recover immediately before his death.

Given. J. R. Carney, Judge.

No. 10. You are further instructed that if you find from the evidence, that said Guerney O. Burtch prior to his death would have had a right of recover against defendant for personal injuries sustained by him because of the alleged negligence set forth in the third paragraph of complaint herein, and you further find that his death resulted in whole or in part from such negligence then the plaintiff herein as administratrix of his estate would be entitled to recover in this action not only such damages as said Burtch might have recovered for his said injuries immediately before he died, but also all damages sustained by his widow and children because of his death.

Given. J. R. Carney, Judge.

No. 11. If you find for the plaintiff it will then become your duty to assess the damages sustained, and in the assessment of damages to be awarded, the fact that the widow of the decedent Guerney O. Burtch has remarried is of no consequence, and should not be considered by you. (160 Ind. 247, 182 Ind. 155.)

Given. J. R. Carney, Judge.

No. 12. If you find that the defendant and plaintiff's decedent Guerney O. Burtch were both engaged in inter-state Commerce at the time he received his injuris, and that such injuries were caused by defendant's negligence as alleged in the third paragraph of complaint herein, then the fact, if it be a fact, that he may have been guilty of contributory negligence would not bar a recovery on the part of plaintiff, but the damages to be awarded in case of recovery [fol. 125] should be diminished in proportion to the amount of negligence attributable to him.

Given. J. R. Carney, Judge.

No. 13. If you find that on or about the 24th day of October 1917, Guerney O. Burtch suffered personal injuries as alleged in the complaint herein, and that within two years thereafter he commenced an action against defendant in the Jackson Circuit Court of Jackson County, Indi-

ana, for damages sustained because of such injuries, and in such action he was later awarded judgment in said court, and that defendant duly appealed from said judgment to the Supreme Court of Indiana, and that while said appeal was pending said Guerney O. Burtch died, and afterwards said judgment was reversed, and said cause remanded to said Circuit Court, and that on the 5th day of March, 1924, the plaintiff herein as the administratrix of the estate of said Burtch, filed an amended complaint for the damages sustained because of such injuries and because of his death, then you are instructed that the statute requiring an action to be commenced within two years after the cause of action accrues does not apply, and this action is not barred by said statute or by any other statute of limitations.

Given. J. R. Carney, Judge.

No. 14. If you find for the plaintiff, it will then become your duty to determine the amount of damages to be awarded, and in fixing the amount of damages it is proper for you to take into account the age, condition of health, habits with respect to industry, and earning capacity of Guerney O. Burtch at the time he received the injuries shown to have been sustained by him and mentioned in the complaint, the nature of his said injuries, the amount and valuation of time lost, if any, because of said injuries, expenses incurred by him, if any, for medical and surgical aid, medicines, nursing and traveling expenses in attempts to heal [fol. 126] and cure his said injuries, and the pain and suffering resulting from such injuries and sustained and suffered by him during his lifetime, so far as shown by the evidence; and if you find for the plaintiff upon the third paragraph of complaint and that his death was due in whole or in part to said injuries, you will also add such further amount as will fairly compensate his widow and children for the damages sustained by them because of his death, which should include such reasonable support and maintenance as he would probably have furnished them, and such care, education, counsel, and guidance of his children as he would probably have given them during minority, in the light of the evidence, and fix the damages at such sum as will fairly compensate, so far as money can do, for the damages sustained, not exceeding Thirty Thousand Dollars.

Given. J. R. Carney, Judge.

No. 15. If you find from the evidence that conductors in the service of defendant had at times prior to October 24th, 1917, at the town of Commiskey, elected to unload heavy and bulky articles of freight carried by defendant, and had called by-standers to aid in such work, notwithstanding a traffic rule under which the owners of such articles might have been required to unload the same, and that this practice had continued for such length of time as to charge defendant with knowledge thereof, then defendant could not escape liability in this case, if otherwise shown, merely because of the existence of such traffic rule.

Given. J. R. Carney, Judge.

No. 16. If you find from the evidence that Guerney O. Burtch was not the owner or consignee of the ensilage cutter by which he was hurt as alleged in the complaint, then you are instructed that the existence of a traffic rule or regulation under which defendant might have required the owner or consignee of such machine to unload the same, [fol. 127] would be wholly immaterial and could not constitute a defense to this action.

Montgomery & Montgomery, Dixon & Meloy, Attys. for Plaintiff.

Instructions No. 1, 2, 3, 4, 5, 6, 7, 8, 8½, 9, 10, 11, 12, 13, 14, 15, and 16 above requested by plaintiff were given to the jury and the defendant at the time duly excepted to the giving of each of said instructions to said jury.

McMullen & McMullen, Attys. for Deft. John R. Carney, Judge.

March 19, 1925.

In Circuit Court of Jennings County

[Title omitted]

Minute Entry—Mar. 19, 1925

Come now the parties, and comes also the Jury and said trial is resumed. And now argument of counsel by both Plaintiff and Defendant being concluded the Court instructs said Jury and now said Jury retired for deliberation under a sworn Bailiff at 5:00 P. M.

[fol. 128] IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted.]

INSTRUCTIONS TO THE JURY

Instruction No. 1

Gentlemen of the Jury: This is a civil action for damages in which Lula Carroll, as administratrix of the estate of Guerney O. Burtch, deceased is plaintiff and the Baltimore and Ohio Railroad Company, is defendant. Plaintiff's amended complaint contains three paragraphs. The first charges a cause of action against defendant under the employer's liability act of this state; the second alleges facts constituting what is termed an action at common law and the third is based upon the Federal Employer's Liability Act. The acts of alleged negligence charged in the several paragraphs are substantially the same. This complaint has been read to you by counsel and you will be permitted to have the same with you in your jury room and for that reason its contents will not be repeated in these instructions.

The defendant has filed an answer in four paragraphs to this complaint. The first paragraph of this answer is a general denial. The second avers that the cause of action sued upon in each paragraph of the complaint did not accrue within two years next before the commencement of this action. The third alleges that plaintiff's decedent died on February 10, 1921, and that so much of plaintiff's cause of action as arises from or is based upon said death did not accrue within two years next before the commencement of this action. The fourt- paragraph of answer avers that plaintiff's decedent was one of a number of persons, owners, and consignees of the ensilage cutter described in the complaint which had been shipped from Louisville, Kentucky, [fol. 129] to Commiskey, Indiana, a station on defendant's road, and that said shipment was made between said stations over the line of defendant's road on a train running between said points. That said ensilage cutter was received and shipped by defendant under and in accordance with the usual written contract in force at said time of

which plaintiff's decedent had full knowledge. That said ensilage cutter was carried by defendant at less than car load ratings, and was very heavy so that the same could not be handled by the regular station and train employees, and said Commiskey was a station where the unloading facilities of defendant were insufficient for handling said shipment. That there was in force and effect on said date and long prior thereto a rule and regulation of said defendant, theretofore filed with the Indiana Public Service Commission, and the Interstate Commerce Commission, and approved by each, providing that such freight as described in plaintiff's amended complaint, should be unloaded by the owners or consignee thereof. That said rule and regulation was in full force and effect at the time of the injury to plaintiff's decedent and of which said decedent had full notice and knowledge. That full compliance with the law requiring the giving of such notice had been rendered by defendant long prior to said injury. That said rule and regulation has at no time been invalidated, overruled or questioned by this plaintiff or said defendant or another person whatsoever.

That said conductor mentioned in plaintiff's complaint had no authority or right to employ plaintiff's decedent in assisting to unload said ensilage cutter or to in any manner bind the defendant by such alleged employment.

That the plank or skid mentioned in the complaint herein was not the property of nor selected by the defendant or its employees but was selected by the owners of said cutter including plaintiff's decedent, and neither the defendant [fol. 130] nor its employees knew of any defect in said skid or plank, nor had any means of such knowledge, but that plaintiff's decedent did know of such defect and had full means of knowing the same prior to said injury and prior to the use of said plank.

The plaintiff filed a reply in general denial to the 2nd, 3rd, and 4th paragraphs of defendant's answer.

These pleadings form the issues in this case.

Instruction No. 2. The burden is upon the plaintiff to prove by a preponderance of the evidence the material allegations of at least one paragraph of her complaint, before he would be entitled to a recovery in this action.

Instruction No. 3. The burden is upon defendant to prove by a preponderance of the evidence, the allegations of its 2nd, 3rd, and 4th paragraphs of answer.

Instruction No. 4. The plaintiff's complaint and the defendant's answer and plaintiff's reply in this cause put this cause at issue and this is the issue you are to try.

Instruction No. 5. You will have with you in the jury room plaintiff's complaint, and defendants' answer and plaintiff's reply, which you will read and carefully study.

Instruction No. 6. I instruct you that the complaint of plaintiff and answer of defendants and the reply of plaintiff in this case are mere formal pleadings and you must not consider them as evidence in this case.

No. 7. Under the issues formed by the pleadings in this case, the burden is upon the plaintiff to prove by a preponderance of the evidence, all the material allegstions of her complaint or of any paragraph thereof. By a preponderance of the evidence is simply meant a greater weight of evidence, and on whichever side you find the greater weight, there you will find the preponderance also.

[fol. 131] No. 8. When it is said in these instructions that the burden is upon the plaintiff or defendant to prove certain issues in the case, it is not to be understood that the plaintiff or defendant are confined solely to the proof furnished by himself on such issue, but, on the other hand, the jury has the right, and it is their duty, to take into consideration all the evidence in the case bearing upon the issues, whether such evidence comes from the side of the plaintiff or whether it comes from the side of the defendant.

No. 9. If all the material allegations in the plaintiff's complaint or of any paragraph thereof have been proven by a preponderance of the evidence, then, in that case, the plaintiff would be entitled to recover in this action.

On the other hand, if the evidence in the case fails to sustain or prove the material allegations of the complaint or at least one paragraph thereof by a preponderance of the evidence, the plaintiff would not be entitled to recover and your verdict should be for the defendant.

No. 10. It is the province and duty of the jury to find the facts from the evidence. It is the province of the Court to instruct you as to the law of the case upon the facts found by you. It is your duty to receive and be governed by the law as the Court instructs it to be. This is what is meant by your oath to try and determine the case and a true verdict render according to the law and the evidence.

No. 11. In this case you accept the law as given by the Court, but you are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to their testimony. If there is real or apparent conflict in the evidence, it is your duty to reconcile that conflict so that it may stand, if that can be done. It is your province to determine what you will accept as true and what you will reject as false, if any.

[fol. 132] In determining what weight you will give to the testimony of a witness you must consider all his evidence whether it is reasonable or unreasonable, sustained or unsustained, whether it is corroborated by other credible evidence, the knowledge the witness has of the facts about which he testifies, the intelligence of the witness, whether or not the witness has been impeached, his opportunity for knowing or recollecting the facts about which he testifies, his manner upon the witness stand, any bias or prejudice he may have exhibited toward or against the plaintiff or defendant. his interest, if any, in the suit, and any and all facts or circumstances or evidence, which, in your minds, act to increase or diminish the weight of such evidence.

Instruction No. 12. Negligence which renders one liable to another who is injured thereby is the doing of some act or thing which it is his duty to refrain from doing; or the failing to do some act or thing which it is his duty to do. Or, to put in in other words, where a person does something which a reasonably careful and prudent person would not do under the same or like circumstances, constitutes negligence; and where such negligent act is done or omitted, and by reason of it another suffers injury therefrom, such negligent person is liable to the injured person, he being without fault.

No. 13. In construing this case, you should look to the evidence for the facts and to the instructions of the Court for the law, and find your verdict accordingly.

The court has not attempted to embody all the law in the case in any one instruction. Therefore, in construing any single instruction, you must consider it in connection with all the other instructions given you and construe them in harmony with each other.

No. 14. In giving these instructions the Court does not mean to tell you, or even intimate to you, what facts are [fol. 133] proven or not proven, or what your verdict should be.

Instruction No. 15. Certain interrogatories will be submitted to you to be answered by you in the event that you find a verdict for the plaintiff or defendant, and in answering them you should answer them by the words "Yes" or "no" if either of these words will be a full and complete answer to them. There may be, however, some interrogatories which cannot be answered by the words "yes" or "no" and in such case you should make such answer to such interrogatory in accordance with the evidence as will be a complete disclosure of the facts inquired about. You must not answer any interrogatory by saying that you do not know, but if there be any evidence on the subject of such interrogatory, then you should answer it in accordance with the preponderance of the evidence on that subject, but if there be no evidence on the subject of any interrogatory, then you may answer it by saying that there is no evidence.

The answers to the interrogatories should be each signed by your foreman and be returned into court with your verdict.

Instruction No. 15. If you find for the plaintiff you will so say by your verdict, the form of which will be:

"We, the jury, find for the plaintiff and assess her damages in the sum of — dollars."

Signed by your foreman, Filling in the amount, not exceeding the amount prayed for in the complaint.

Instruction No. 17. If you find for the defendant the form of your verdict will be:

"We, the jury, find for the defendant."

Signed by your foreman.

Instruction No. 18. I have prepared for you forms of verdicts as above, one of which you may use, or you may write your own verdict.

[fols. 134-141] When you retire to your jury room you will select one of your number as Foreman, and when you have agreed on a verdict you will return it into open Court signed by your Foreman.

Read to the jury at the conclusion of the argument this 19 day of March, 1925.

John R. Carney, Judge.

The defendant duly excepted at the time to the giving of each of the above instructions to the jury by the Court of its own motion.

McMullen & McMullen, Att'ys for Deft. John R. Carney, Judge.

March 19, 1925.

Plaintiff's requested instructions omitted; printed side page 120 note.

[fols. 142-151] Defendant's requested instructions omitted; printed side page 109 note.

[fol. 152] In Circuit Court of Jennings County

Verdict and Answers to Interrogatories

Come now the parties and the Jury having agreed upon a verdict also comes and returns into open Court its verdict, as follows: "We, the Jury find for the plaintiff and assess her damages in the sum of $15,000.00.

O. N. Davis, Foreman.

And at the same time the jury also returns the interrogatories submitted to it by the Court with its answers thereto, as follows:

1. What was the date of the death of plaintiff's decedent, Guerney O. Burtch?

Feb. 10th, 1921.

O. N. Davis, Foreman.

2. What was the date of the injury which it claimed caused the death of said Guerney O. Burtch?
October 24th, 1917?

O. N. Davis, Foreman.

3. Did not the plaintiff herein file her amended complaint in this cause on March 5, 1924.
Yes.

O. N. Davis, Foreman.

4. Was not the amended complaint mentioned in Interrogatory #3 the first complaint filed by said Lula Carroll, as administratrix of the estate of said Guerney O. Burtch?
Yes.

O. N. Davis, Foreman.

5. Was not said administratrix duly appointed administratrix of the estate of said Guerney O. Burtch, deceased, on the 14th day of February, 1921, and thereupon duly qualified and has been since said date and is now acting as such administratrix?
Yes.

O. N. Davis, Foreman.

6. Was not the injury on which plaintiff bases her action herein the same injury for which said Guerney O. Burtch sued in his life time and recovered judgment in the Jackson Circuit Court of Indiana, which judgment was thereafter [fol. 153] affirmed by the Supreme Court of Indiana and then reversed by the Supreme Court of the United States?
Yes.

O. N. Davis, Foreman.

7. Was not said Guerney O. Burtch over the age of twenty-one years at the time of the alleged injury?
Yes.

O. N. Davis, Foreman.

8. Was not said Burtch a resident of Jennings County, Indiana at the time of the alleged injury?
Yes.

O. N. Davis, Foreman.

9. Did not said Guerney O. —— continue to reside in said Jennings County, Indiana, from the date of the alleged injury until the date of his death?

Yes.

O. N. Davis, Foreman.

10. Was not said alleged injury received in Jennings County, Indiana?

Yes.

O. N. Davis, Foreman.

11. Did not the ensilage cutter mentioned in the complaint come from Louisville, in the State of Kentucky, to Commiskey, Jennings County, Indiana, in a local freight train operated by the defendant?

Yes.

O. N. Davis, Foreman.

12. Was not the car in which said ensilage cutter was being carried standing still on a sidetrack at said station of Commiskey at the time said injury is claimed to have been received?

Yes.

O. N. Davis, Foreman.

13. Was not said injury caused by the breaking of a plank on which said machine was being unloaded from said freight car?

Yes.

O. N. Davis, Foreman.

14. Were not the two planks on which it was attempted to unload said machine brought from a sawmill nearby by said decedent Guerney O. Burtch and Granville Arbuckle?

Yes.

O. N. Davis, Foreman.

[fol. 154] 15. Were not said planks each about ten or twelve feet long and 3½ inches thick?

No.

O. N. Davis, Foreman.

16. If you answer Interrogatory 15 "No", give the dimensions of each of said planks.
About 2" or 3" x 6", 12 or 14 ft. long.
O. N. Davis, Foreman.

17. Were not said planks green poplar?
Fresh sawed poplar.
O. N. Davis, Foreman.

18. Were not said planks selected by said Burtch and said Arbuckle?
No.
O. N. Davis, Foreman.

19. If you answer Interrogatory #18, "No", then state who did select said planks.
Ed Jackson Conductor.
O. N. Davis, Foreman.

20. Did either of said planks show any defects apparent to said decedent Burtch or said Arbuckle at the time of the selection of said planks by said two men?
No.
O. N. Davis, Foreman.

21. Did either of said planks show any defects apparent to said decedent Burtch or said Arbuckle from the time of the selection of said planks by said two men up to the time of the happening of the alleged injury?
No.
O. N. Davis, Foreman.

22. If you answer either Interrogatory #20 or #21 in the affirmative, then state what those defects were.
——.

——.

23. Was the defect in the plank the cause of it breaking?
Yes.
O. N. Davis, Foreman.

24. Was the defect which caused the plank to break apparent to any of those who examined same before the happening of the alleged injury?
Yes if properly examined.
O. N. Davis, Foreman.

25. Was not the defect which caused the plank to break [fol. 155] one which could not have been discovered by the naked eye prior to the happening of the alleged injury?

No.

O. N. Davis, Foreman.

26. Did not the alleged injury to plaintiff's decedent occur October 24, 1917, near 4 P. M.

Yes.

O. N. Davis, Foreman.

27. Was not the decedent, Guerney O. Burtch, possessed of good eyesight on said last named date prior to the accident?

Yes.

O. N. Davis, Foreman.

28. Had not the decedent farmed all his life?

Yes up the time — Injury.

O. N. Davis, Foreman.

29. Was not said Granville Arbuckle a farmer for several years prior to the accident of the decedent?

Yes.

O. N. Davis, Foreman.

30. Was not said Burtch one of the purchasers of said ensilage cutter?

Was to buy from C. F. Lurton.

O. N. Davis, Foreman.

31. Was not said Burtch on said station platform prior to said injury to obtain said machine as one of the owners thereof?

No.

O. N. Davis, Foreman.

32. Was said Burtch an employee of the defendant at the time of the injury as alleged or immediately prior thereto?

Yes.

O. N. Davis, Foreman.

33. If you answer Interrogatory No. 32, "Yes" then state what his pay was.

No compensation.

O. N. Davis, Foreman.

34. If you answer Interrogatory No. 32, "Yes" then state what the terms of his contract were and who hired him and whether he was hired by the day, hour, or other period of time.

Hired by Ed Jackson, to help unload Cutter. No terms made.

O. N. Davis, Foreman.

35. Did said conductor assist in the unloading of said machine?

[fol. 156] Yes.

O. N. Davis, Foreman.

36. If you answer Interrogatory No. 35 "Yes" state how he helped.

By overseeing and helping to steadying machine on the skids.

O. N. Davis, Foreman.

37. Was it not daylight at the time of the alleged injury and for several hours immediately preceeding said injury?

Yes.

—— ——.

38. What, if anything, prevented the decedent, Guerney O. Burtch from discovering the defect in said plank?

Not visible by him while performing his work.

O. N. Davis, Foreman.

39. Was decedent Burtch engaged in unloading the said ensilage cutter from the car at the time the plank broke and he was injured?

Yes.

O. N. Davis, Foreman.

40. Was not decedent of sound mind and under no legal disability at the time he was injured and did he not continue so until his death?

Yes.

O. N. Davis, Foreman.

41. How far from where planks were gotten to car in which ensilage cutter was?

About 60 ft.

O. N. Davis, Foreman.

42. Did conductor Jackson go into saw mill with Arbuckle and decedent to get planks?

No.

O. N. Davis, Foreman.

43. Did either of said planks show any defects to Arbuckle or decedent at the time they got the planks at the saw mill?

No.

O. N. Davis, Foreman.

44. What defect or defects were apparent in the planks at the saw mill that could not have been discovered by the use of ordinary care?

None.

O. N. Davis, Foreman.

45. What was the defect in the plank which caused it to break?

Knot.

O. N. Davis, Foreman.

46. Was the defect that caused the plank to break one [fol. 157] that could have been discovered by Arbuckle or decedent if they had examined the same with ordinary care at the saw mill or on the way to the car or at the car at anytime before said plank broke?

No.

O. N. Davis, Foreman.

47. Did decedent make any examination of plank which broke before the same was brought to car to be used?

No evidence.

O. N. Davis, Foreman.

48. Was the ensilage cutter attempted to be unloaded over the spur track with the consent of Burtch and Arbuckle?

No.

O. N. Davis, Foreman.

49. Did said decedent assist in unloading other freight from said car before said cutter was attempted to be removed?

Yes.

O. N. Davis, Foreman.

50. Did decedent assist in moving said cutter to the door of the car on the day he was injured?

Yes.

O. N. Davis, Foreman.

51. Did said decedent know said cutter was very heavy before the same was placed upon the planks for removal from car?

Yes.

O. N. Davis, Foreman.

52. Did the car in which said cutter was brought to Commiskey, Indiana, have freight for other points beyond and east of Commiskey?

Yes.

O. N. Davis, Foreman.

53. Did said car come in said train from Louisville, Kentucky, to Commiskey?

Yes.

O. N. Davis, Foreman.

54. Did said cutter come to said Commiskey in said car from Louisville, Kentucky?

Yes.

O. N. Davis, Foreman.

55. Is said Commiskey in the State of Indiana?

Yes.

O. N. Davis, Foreman.

56. Was there in full force and effect at the time of plaintiff's alleged injury, an official classification of rates, rules, regulations and tariffs?

[fol. 158] Yes.

O. N. Davis, Foreman.

57. Was the official classification of rates, rules, tariffs and regulations that was in force and effect on the road of defendant at the time plaintiff's alleged injury known as "Official Classification No. 44"?

Yes.

O. N. Davis, Foreman.

58. Had said "Official Classification No. 44" been filed with the Public Service Commission of Indiana on December 14, 1916?

Yes.

O. N. Davis, Foreman.

59. Had said "Official Classification No. 44" been filed with the Interstate Commerce Commission on December 12, 1916?

Yes.

O. N. Davis, Foreman.

60. Was there not in full force and effect at the time plaintiff was injured and it being one of the rules and regulations included in said "Official Classification No. 44" on page 30 thereof, the following viz:

"Owners are required to load and unload heavy or bulky freight carried at L. C. L. ratings that cannot be handled by the regular station employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling?

Yes.

O. N. Davis, Foreman.

61. Do not the letters quoted above "L. C. L." stand for the words "Less than Car Load Lots"?

Yes.

O. N. Davis, Foreman.

62. Was plaintiff an employee of defendant at the time he was injured?

Yes.

O. N. Davis, Foreman.

63. If plaintiff was an employee by whom and when was he employed?

Ed Jackson Oct. 24, 1917.

O. N. Davis, Foreman.

64. Did not plaintiff have as good an opportunity to see, examine and know of the condition of said timbers as the [fol. 159] defendant or any of its employees?

No.

O. N. Davis, Foreman.

65. Was the defect in said plank such a defect as could have been discovered by either Arbuckle, decedent or Conductor Jackson by the use of ordinary care?

Jackson could as overseer but not workman.

O. N. Davis, Foreman.

66. Was the plank sufficient for the purpose for which it was brought to the car in the judgment of said Arbuckle and decedent?

Yes.

O. N. Davis, Foreman.

67. Was decedent a farmer and familiar with moving heavy objects and familiar with timber?

Was a farmer but wasn't a Judge of Timber or mover of heavy machinery.

O. N. Davis, Foreman.

In Circuit Court of Jennings County

[Title omitted]

[fol. 160] Motion for Judgment on Answers—Filed Mar. 21, 1925

Comes the defendant in the above entitled cause, The Baltimore and Ohio Southwestern Railroad Company, and moves the Court for judgment in its favor in said cause on

the interrogatories and answers thereto returned by the jury in said cause with their general verdict in said cause notwithstanding said general verdict.

Verbard and McMullen and McMullen, Attorneys for Defendant.

And the court having seen and examined said motion and being advised duly in the premises, now overrules said motion and the defendant at the time objects and excepts to such ruling of the Court.

In Circuit Court of Jennings County

Judgment

And now the plaintiff moves the Court for Judgment on the general verdict of the jury which motion is sustained by the Court and the Court now renders judgment on the verdict of the Jury herein and in accordance therewith.

It is therefore considered and adjudged by the Court that the plaintiff Lula Carroll, as administratrix of the estate of Guerney O. Burtch, deceased, herein recover of and from the defendant the Baltimore and Ohio S. W. R. R. Co. herein the sum of Fifteen Thousand Dollars, together with her costs in this cause laid out and expended taxed at —— Dollars and — cents.

[fol. 161] In Circuit Court of Jennings County

[Title omitted]

Motion for New Trial—Filed April 11, 1925

The defendant in the above entitled cause moves the Court for new trial thereof for the following reasons and each of them separately and severally, viz:

1. The Court erred in overruling defendant's motion to have the transcript and papers in said cause returned to the Clerk of the Jackson Circuit Court for correction and proper certification, to which ruling the defendant excepted at the time.

2. The verdict of the Jury is not sustained by sufficient evidence.

3. The verdict of the Jury is contrary to law.

4. The verdict of the Jury is contrary to law and the evidence.

5. The damages assessed by the Jury are excessive.

6. The assessment of the amount of recovery is erroneous being too large.

7. The court erred in giving to the jury, of its own motion each of the instructions, separately and severally, numbered from one to eighteen inclusive.

8. The Court erred in giving to the jury each of the instructions, requested by the plaintiff, separately and [fol. 162] severally, numbered 1, 2, 3, 4, 5, 6, 7, 8, 8½, 9, 10, 11, 12, 13, 14, 15, and 16.

9. The Court erred in refusing to give to the jury each of the following instructions requested by defendant, separately and severally, numbered 10, 25, 26, 27, 28, 31, 32, 33, 34, 35.

10. The Court erred in permitting Doctor Osterman, Witness for the plaintiff, to answer a question as to the reasonable compensation for nursing of decedent over the objection of the defendant that there was no proof of any nursing other than the wife of said decedent and the services of the wife belonged to the decedent to which ruling the defendant at the time fully excepted.

11. The Court erred in permitting the plaintiff's witness, D. M. Green, to answer a question as to what had been the practice within his knowledge of the defendant at the station (of Commiskey) during the time he was station agent, with regard to calling on bystanders to assist in unloading heavy articles of freight previous to October 24, 1917, over the objection of the defendant that no such custom or practice had been pleaded in this case: that if there had been such a custom existing at the time inquired about, it was in violation of law; that it was not shown that such custom or practice was brought to the knowledge of the defendant; that such custom, if any, was not shown to have been anywhere except at said station of Commiskey and the witness has not shown himself to have been qualified as to the custom existing at other stations along the line of the

defendant's railroad that it is discrimination between the patrons of the defendant railroad which is prohibited by the published rules and regulations of the Intere State Commerce Commission; that question is leading; that it was an assumption of authority on the part of the conductor in direct conflict with both the Federal and State Laws governing such matters if same was done and was therefore unlawful and could have no weight in this cause; that this question calls for an isolated instance of the practice; that it is not shown that the practice was so general as to bind [fol. 163] the defendant even if permitted by law; which objection was overruled and to which ruling the defendant at the time excepted.

12. The Court erred in permitting the plaintiff's witness, Mr. Artz, to answer a question as to what was said by a conductor of the defendant some four years previously as to unloading an ensilage cutter for the witness over the objection of the defendant that the time inquired about was too remote being some four years prior to the injury complained about in this cause and could have no bearing on the issues in this cause and proves or disproves nothing in this case; that it is a voluntary statement of the witness not connected with the cause of action herein and it is not shown that — had any authority to change any rule as laid down by the Inter State Commerce Commission; that it is not pleaded in the complaint and was misleading and prejudicial, which objection was overruled to which ruling the defendant at the time objected and excepted.

13. The Court erred in permitting the plaintiff's witness, Mr. Lurton, to testify as to his knowledge of the practice of the defendant while he was agent at Commiskey as to defendant's conductors calling for assistance in unloading heavy articles of freight at that station over the objection of the defendant that there was no allegation in any pleading covering the matters inquired about; that the question did not cover the period when the accident occurred to the decedent Burtch; that any practice which may have existed in 1912 and prior thereto was not within the issues herein, which objection was overruled to which ruling the defendant at the time excepted.

14. The Court erred in permitting the plaintiff to introduce in evidence the transcript of proceedings had in the Jackson Circuit Court over the objection of the defendant

that the so-called transcript does not show this to be the same case as originally instituted in the Jackson Circuit [fol. 164] Court under the title of Guerney O. Burtch vs. The Baltimore and Ohio Southwestern Railroad Company; nor does the record show that Lula A. Carroll, as administratrix of the estate of Guerney O. Burtch, deceased, the present plaintiff in the cause on trial to be authorized as such administratrix, to prosecute any suit on behalf of the estate of Guerney O. Burtch, deceased, or to prosecute any continuation of any case arising out of the injury and death of said Guerney O. Burtch, who was the original plaintiff in the cause of Guerney O. Burtch vs. The Baltimore and Ohio Southwestern Railroad Company, formerly pending in the Jackson Circuit Court; that the record shows that any case arising out of the injury or death of Guerney O. Burtch against the said Railroad Company is barred by the statute of limitations; that the cause of action abated at the death of said Guerney O. Burtch; that there was no third paragraph of complaint on file in any case on account of the injury or death of said Guerney O. Burtch at the time of his death.

15. The Court erred in permitting the plaintiff to introduce in evidence, over the objection of the defendant, the certified copy of the proceedings in the Supreme Court of the United States of the case of Lula A. Burtch, administratrix etc. vs. The Baltimore and Ohio Southwestern Railroad Company, because said transcript showed one Lula A. Burtch was substituted as administratrix of the estate of Guerney O. Burtch, deceased, and the cause on trial is entitled Lula A. Carroll, Administratrix of the estate of Guerney O. Burtch, deceased, and that said transcript does not prove nor disprove any of the issues in this cause now on trial, which objection was overruled and to which ruling the defendant at the time excepted.

16. The Court erred in allowing the plaintiff's witness, Lula A. Carroll, to answer that she is now the administratrix of the estate of Guerney O. Burtch, over the ob- [fol. 165] jection of defendant that this fact could not be proven by parol evidence and the records fail to show her appointment or her substitution as plaintiff herein which objection was overruled to which ruling the defendant at the time excepted.

17. The Court erred in allowing the plaintiff's witness, Lula A. Carroll, to answer as to what feeling the decedent had in his legs or feet over the objection of the defendant that there were two causes of action set forth in the amended complaint and the defendant was not informed as to which theory the plaintiff was pursuing and one theory this evidence would be misleading and prejudicial and immaterial; that matters sought to be elicited by this question go to make up the cause of action, if any, which abated at the death of said Guerney O. Burtch and is a departure from the original complaint first filed in this action to which the present is an amendment; that the claim which this evidence is offered to prove is barred by the statute of *of* limitations; that the record so far introduced fails to show this to be an action for the same injuries from which judgment was recovered by the decedent in the former action; that the original amended complaint now before the court is in the name of Lula A. Carroll, Administratrix etc. and the record from the Jackson Circuit Court which has been read to the jury by the plaintiff to prove what took place in the Jackson Circuit Court, shows by each and every item therein that one Lula A. Burtch, administratrix of the estate of Guerney O. Burtch, deceased, was the plaintiff and not Lula A. Carroll; that said entry was made after the marriage of the said Lula A. Carroll and after the filing of the amended complaint in this action in the name of Lula A. Carroll administratrix of the estate of Guerney O. Burtch, deceased, which objection was overruled and to which ruling the defendant at the time excepted.

18. The Court erred in allowing the plaintiff's witness, [fol. 166] Lula A. Carroll, to testify as to the disposition of the decedent towards his children, over the objection of the defendant that the plaintiff was limited in this action to pecuniary damages and that there were no allegations in the complaint pertaining to the disposition of the decedent, this objection being separate and several as to each paragraph of complaint, which objection was overruled and to which ruling the defendant at the time separately and severally excepted.

19. The Court erred in allowing plaintiff's witness, Mr. Gothlin, to answer a question as to the practice of carriers,

in 1917, of notifying consignees of arrival of freight after placing same on siding over the objection of the defendant that parol evidence can not be properly introduced to contradict a rule established by law of the United States and of Indiana as well; that there is no allegation in the amended complaint on the subject of such a practice; that it is misleading and prejudicial and seeks to change a written rule which is susceptible of only one construction; that any violation of this rule by any such practice would also be a discrimination in favor of the patrons of the road as against others; that the practice is not limited to this defendant nor to any locality and the witness was not shown to be qualified as to practice at Commiskey, Indiana, at the time in question or at any time; nor that defendant knew of any such practice; that it is a departure from the theory heretofore adopted in this case, viz: That it was a custom grown up by the practice of conductors of the defendant, which objection was overruled to which ruling the defendant at the time excepted.

The additional objection was made also that in this case the owners were present when train arrived to receive the freight and therefore the evidence was immaterial.

20. The Court erred in overruling the motion filed by defendant under a special appearance, asking that tran-[fol. 167] script and papers be returned to the Jackson Circuit Court for correction and proper certification which motion was overruled to which ruling the defendant at the time excepted.

21. The jury trying said cause was guilty of misconduct as shown by their answers to the interrogatories propounded to them and which were returned with their general verdict, and in their answers to each of said interrogatories, separately and severally.

22. The court erred in permitting the witness Lula A. Carroll, to answer a question as to what family the decedent left at the time of his death over the objection of the defendant that the authority of the plaintiff herein to prosecute this action is not shown and that for any action for damages to the widow and children or either of them is barred by the statute of limitations and that the cause of action for such damages abated at the death of said Guer-

ney O. Burtch which objection the court overruled to which ruling the defendant at the time excepted.

23. The court erred in overruling the defendant's motion to strike out the answer of the witness for plaintiff, D. M. Green, to a question as to what he knew of conductors calling for help prior to Oct. 24, 1917, in unloading heavy freight, to which he answered that he had heard Ed Jackson calling for help at different times but no others; to which the defendant moved to strike out the answer as not being responsive to the question which motion was overruled to which ruling the defendant at the time excepted.

Verbarg, McMullen & McMullen, Att'ys for Deft.

[fols. 168 & 169] In Circuit Court of Jennings County

[Title omitted]

Order Overruling Motion for New Trial, Etc. —June 1, 1925

Comes now the plaintiff and defendant in the above entitled cause by their respective attorneys as heretofore, and present to the Court defendant's motion for a new trial of said cause, which motion was filed in vacation of said court on April 11, 1925, and the Court being duly advised in the premises overrules defendant's said motion for a new trial of said cause to which ruling of the Court in overruling said motion for a new trial, the defendant at the time, objects and excepts and prays an appeal to the Supreme Court of the State of Indiana, which appeal is granted by the Court and the bond for said appeal is fixed at eighteen thousand dollars, and the defendant nominates the United States Fidelity and Guarantee Company of Baltimore, Md. as surety on said bond, which surety is approved by the Court and the defendant is given thirty days to file said bond with the Clerk of this Court. Defendant is given ninety days within which time to present and file its general bill of exceptions. All of which is ordered and adjudged by the Court.

Bond on appeal for $18,000, approved and filed June 30, 1925, omitted in printing.

[fol. 170] Comes now the defendant, in vacation of the Jennings Circuit Court, this 22nd day of August, 1925, and presents his general bill of exceptions containing the evidence and the rulings made thereon during the course of the trial, which is now examined herein, and is in words and figures following:

[fol. 171] In Circuit Court of Jennings County

No. 7286

Lula A. Carroll, as administratrix of the estate of Guerney O. Burtch, Deceased,

vs.

The Baltimore and Ohio Southwestern Railroad Company

Bill of Exceptions

Caption

Be it remembered, that on the 16th day of March, 1925, the above entitled cause being at issue, the following evidence was introduced by both plaintiff and defendant.
[fol. 172] And the said Dennis W. Mathews, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows, to-wit:

Direct examination by Mr. O. H. Montgomery:

Q Please state your name to the jury?
A. Ennis W. Mathews.
Q. Where do you live?
A Comiskey, Indiana.
Q. What is your profession and occupation?
A. Physician.
Q. How long have you been engaged in the practice of medicine?

A. Since July 1st, 1903.

Q. And where have you been located during that time?

A. Six years in Washington County, Indiana, and a little over fifteen years at Comiskey.

Q. Are you a graduate of any medical college and if so what institution?

A. Hospital College of Medicine, Louisville, Kentucky.

Q. You are *a* duly licensed as a physician under the laws of Indiana?

A. Yes .

Q. Doctor, did you know Guerney O. Burtch in his lifetime?

A. Yes.

Q. Where did he live?

A. Little over fourth of a mile west of Comiskey.

Q. What was his occupation?

A. Farming.

Q. Do you recall the fact of his having been hurt in an accident at the station of Comiskey?

A. Yes.

[fol. 173] Q. Were you called to see or wait on him after that?

A. Yes.

Q. About how long after the injury was it until you saw him?

A. I do not know.

Q. When did you first see him?

A. Soon after the accident at the depot.

Q. In what part of the station or depot was he in?

A. In the waiting room.

Q. And what was his position?

A. He was lying on a cushion purported to have been taken from the caboose.

Q. On the seat or floor or what?

A. On a seat if I remember.

Q. And what was his condition, mentally, was he conscious?

A. Yes.

Q. And did you make an examination of his physical condition?

A. The best I could.

Q. And you may tell the jury what you found about his ailment at that time?

A. About all that I could determine was he had three ribs broken and spine injured from the fact he had no feeling, apparently no use of his legs.

Q. How much of an examination did you make that evening, I mean, did you make a thorough examination then or later?

A. After we took him home.

Q. What was his ability to walk or to move or help himself at the time you saw him there?

A. He couldn't, he couldn't move his legs at all, and from the pain couldn't hardly stand to be moved.

Q. What complaint of pain if any was he making at that time?

A. Complained of his back mostly and his side.

Q. And what would you say from the nature of the in-
[fol. 174] juries he was suffering pain?

A. I would say he was.

Q. And what would be the character of the pain as to intense or otherwise?

A. Be very intense.

Q How long did he remain at the station before he was taken home?

A. Probably an hour.

Q. And how was he taken home?

A. I don't remember.

Q. Do you know in what way he was transported?

A. I don't remember how he was taken home.

Q. Then how soon afterwards until you saw him again?

A. If I remember I was there when they took him in the house.

Q. How did you get him from the conveyance to the house?

A. On a stretcher.

Q. Did you make further examination then at the house?

A. Yes.

Q. And what did you find about the extent of his injuries then, outside of these ribs broken and the injury to the spine?

A. Was just a swelling about there.

Q. Could you determine whether the vertebra or any of the vertebrae of the back had been fractured or damaged?

A. There was a prominence there about all you could

determine on palpation, there was a prominence of the spine.

Q. And what if any complaint of pain did he make then at home?

A. Very much.

Q. And did you disciver at that time the extent of paralysis if there was such?

A. At that time all I could tell was the fact he could not move his legs, I had given him a hypodermic of morphine to relieve his pain partially before we left the depot, and couldn't determine exactly until the effect of that had worn off.

[fol. 175] Q. Did you see him any more that night or evening?

A. I don't remember.

Q. Well, what did you find on your further examination as to the extent of the paralysis?

A. He had absolutely no sensation on one side and no motion for a time on the other.

Q. By sensation you mean he had no feeling?

A. No feeling.

Q. No motion in one of his legs?

A. Yes.

Q. And in the other he had a slight feeling?

A. Yes.

Q. How far up on his body did the paralysis extend?

A. If I remember about the tenth or twelfth dorsel vertebra parallel with these ribs that was injured.

Q. What effect did the injury have upon his kidneys and bladder?

A. He had incontinency of the urine, that is required the use of a catheter to draw his urine.

Q. What effect did the injury have upon his bowels?

A. They were paralysed, had no control whatever that is as far as sensation was concerned, had no knowledge.

Q. They wouod move involuntarily and without his knowledge?

A. Yes.

Q. And what was the extent of the paralysis as to all of the abdominal muscles below the tenth dorsel vertebra?

A. He seemed to be most of the muscles was paralyses from the injury down.

Q. How often did you see him from that day on?

A. I do not know.

Q. You don't remember just how many visits you made to him?

A. Yes.

Q. This was the 24th of October, 1917, when you was [fol. 176] called to the depot?

A. Yes.

Q. Did you visit him frequently from time to time?

A. At first for a while I did.

Q. And what if any improvement did he make?

A. Very little for a few weeks.

Q. Was there at any time any improvement in the paralysis of his bladder or bowels?

A. None whatever.

Q. You may state whether or not you continued to visit him and administer to him occasionally on to his death?

A. I did just when I was summoned.

Q. Now do you know of his taking other tr-atments in addition to those you gave?

A. I had been informed he had been treated by an osteopath and chiropractor.

Q. Do you know whether or not he got able to get out of the house and out of his bed?

A. Yes.

Q. And how did he get about?

A. Being able to move on crutches.

Q. And do you know how long he went on crutches?

A. I do not know.

Q. And you may state whether or not he was able to travel by any other means other than crutches?

A. He could get about a little by a cane.

Q. And what was his condition if you know in regard to suffering pain continuously after the injury?

A. Well, later on I think he did not suffer so much pain all the time, but periodically the pain was intense.

Q. What effect if you know did the pain have, immediately after the injury, in regard to his ability to sleep?

[fol. 177] A. He wasn't able to sleep without the use of hypnotics.

Mr. McMullen: What was that last word?
(Reread by the stenographer) hypnotics.

Q. What if any effect did it have on his ability to work and earn money after his injury?
A. He was never able to work any.
Q. And what necessity if any was there for his having to have assistance of nursing?
A. He had to have someone to use the catheter when the bladder became filled and also to care for him when he would have to attend to calls of nature, he had no use, the powels appeared to be paralysed until he had no action of the bowels without taking a laxative, needed someone to care for him.
Q. In taking the laxatives could he control his bowels when the occasion occurred?
A. Not at all.
Q. You mean he had to require the services of someone to clean him up and keep him in condition?
A. Yes.
Q. If he were out in company with others would he be able *in* any extent to control the actions of his bowels?
A. No.
Q. What was the condition of his health if you know before this accident doctor?
A. Good.
Q. You know about what his age was at that time?
A. About thirty or thirty-one.
Q. Can you tell the jury about what expense for treatment he incurred with you for doctoring his injuries?
A. About one hundred dollars.
Q. When did he die doctor, do you remember?
A. I don't remember.
[fol. 178] Q. Along about the 10th of February, 1921, four years ago?
A. Been three or four years ago.
Q. Did you attend him at the time of his death?
A. Just immediately before.
Q. What was the cause of his death doctor?
A. I don't remember the immediate cause of death, he just went down gradually, health began to fail and got weaker and weaker until——
Q. From the time he was hurt you mean on?

A. Yes, not from the time he was hurt but after he began to decline; he improved so he was able to get around for a while before this.

Q. And what would you say in your opinion was the cause of his death?

A. I do not think there is any question but what his death was primarily due to the injury.

Q. What family did he leave at the time of his death?

A. He had at the time of his death, he had a wife and two children.

Q. The children were a girl and a boy?

A. Girl and boy.

Q. To what extent did he require nursing after he was hurt doctor, how much of his time, whether all the time?

A. He had to have attention more or less all the time.

Q. Could you tell the jury about what would be a reasonable charge for nursing which he required?

A. I would not have any idea.

Q. Give your best judgment about that.

A. I do not know how I would charge that if it was me.

Q. No, just what would be a fair compensation for the nursing in that community of such nursing as he required?

Mr. McMullen: We suppose the doctor knew what kind of nursing he had.

Q. You knew did you not what nursing he received from [fol. 197] time to time, did you?

A. Yes.

Q. Now give the jury your best judgment about what would be a fair compensation for that?

Mr. McMullen: This nursing was by whom?

A. Mrs. Burtch.

Mr. McMullen: The defendant is objecting to the reasonable value of nursing furnished by the wife for the reason that a man is entitled to the services of his wife in nursing him without compensation.

Mr. Montgomery: The question will be withdrawn for the present.

Q. Can you tell about how long he was confined to his bed following his injury?

A. I cannot.

Q. Approximately how long was it, two or three or four months?

A. I judge three or four months, possibly longer.

Q. What was his occupation in life?

A. Beg pardon.

Q. What was his occupation in life?

A. Farming.

Q. What if any pain did he suffer immediately before his death at the time you was there?

A. I do not remember anything at all about the conditions at that time.

Q. At the time you first visited him at the station what was his ability to talk or speak?

A. I don't remember.

Q. You gave him a hypodermic right away to relieve, as far as you could, his pain?

A. Yes, the best I remember thought he could talk.

Q. What was your judgment from the start as to whether or not his injury was curable or incurable?

[fol. 180] A. It was incurable.

Q. What was the probable outcome of it being fatal or otherwise?

A. We predicted it would be fatal.

Q. What danger is there from the use of a catheter in artificially removing the contents of the bladder?

A. Infection of the bladder principally.

Q. That is almost the case?

A. Yes.

Mr. Montgomery: That is all.

Cross-examination.

By Mr. Harry R. McMullen:

Q. Any infection in this case?

A. At times.

Q. That rapidly yielded to treatment?

A. Yes.

Q. When did you notice the infection?

A. He would develop a little fever.

Q. You treated him at first how long?

A. I don't remember.

Q. About three months wasn't it?

A. Probably.

Q. And then you did not treat him until just immediately before his death?

A. I don't remember whether I was called to see him during the interval or not.

Q. All you testified to about pain or suffering or treatment was just within your recollection, was something like three months after his injury and then not up until immediately before his death?

A. I do not remember how often I just went when they summoned me the first three or four months.

Q. Now you put four months, do you remember testifying [fol. 181] last time in this trial?

A. Yes.

Q. Do you remember of saying three months?

A. I don't remember, whatever I said.

Q. You say now your best recollection is three or four months?

A. Yes.

Q. And in that time or several times he had fever and you attributed it to the use of a catheter?

A. Yes.

Q. He was a farmer you say?

A. Yes.

Q. And had been how long about in your knowledge?

A. All his life.

Q. Raised on a farm?

A. Yes.

Q. You had known him how long?

A. I came to Commiskey in 1909 and knew him until the time of his death.

Q. I believe you were not at the depot?

A. No.

Q. When did you first notice any improvement, that was after the three or four months was it not?

A. Yes.

Q. Then he began to get up so he could get around with a cane?

A. After a good long while, yes.

Q. This pain you speak of what part of this three or four months was the pain steady?

A. The pain was steady until after these ribs had apparently healed up.

Q. And that was about when? Six or eight weeks?
A. Yes, six or eight weeks.
Q. And then the pain would only be once in a while?
[fol. 182] A. Be severe at times and not so bad at others.
Q. That is what I mean, there was intervals there?
A. Yes.
Q. And that lasted while you was there the three or four months?
A. Yes.
Q. These intervals get more frequent?
A. They were periodic, sometimes the pain would be more or less.
Q. More or less the time between?
A. Yes.
Q. Get longer, the time between the periods you treated him?
A. Yes.
Q. And that was the way after the first six or eight weeks was it?
A. Yes.
Q. Now I believe you stated you was there just immediately before he died, what do you mean by immediately, can you give us something more definite about that?
A. I think I was there the day before he died.
Q. Your bill I believe you stated was one hundred dollars?
A. Something like that.
Q. His health before that had been good had it?
A. Yes.
Q. You had treated him had you?
A. Before hand?
Q. Yes.
A. I don't remember of ever treating him, he himself or not.
Q. Don't you remember of testifying the last trial of treating him or do you?
A. I don't remember, whatever I said then was right though.
Q. You don't remember what that was and you don't remember now whether you treated him before or not?
A. No.
Q. You was the family physician was you not?

[fol. 183] A. Yes.

Q. Could you indicate on your body for the benefit of the jury these ribs you say was broken, please stand up doctor?

A. (Doctor stand up) here they are three lower ribs (indicating) if I remember right.

Q. All on one side, three lower ribs on one side?

A. Yes.

Q. Which side doctor?

A. I believe it was the left side.

Q. That was where the pain came from for the first six or eight weeks.

A. Yes, that and the injury of the spine of course pain there for a long time.

Q. But the severe pain was that from the spine or ribs?

A. Well apparently at the start from the injury to the spine and spinal cord and nerves.

Q. Well afterwards I understood you to say, maybe I am mistaken about that, after the six or eight weeks then the pain, after the ribs was healed, was not so severe was that right?

A. Not so severe.

Q. And then only once in a while did he have pain, I believe you stated that?

A. While he was in my care.

Q. I understand that, in your care. This pain after the six or eight weeks that came once in a while was where?

A. He complained of his back mostly in the region of the injury, he had pain at nights.

Q. You know that from what he said?

A. Yes.

Q. And below the injury there wasn't any feeling was there?

A. Not much.

Q. That was why?

[fol. 184] A. The spinal cord being injured.

Q. Pressed together somewhat?

A. Yes.

Q. So that the pain below there wasn't so severe?

A. Not preceptible.

Q. Locate the injury to the spine with reference to one of the ribs if you could, above or below?

A. I do not believe I could, I think they were about parallel, I think the injury all happen to one lick, one blow.

Mr. McMullen: That is all.

Redirect examination,

By Mr. O. Montgomery:

Q. You recall what if any tests you made to determine whether any feeling in his legs or feet?

A. Yes, I used an instrument soak the bottom of his feet to see whether there was any reflexes and also test with the knee jerk and stick him with pins and things of that kind.

Q. And what did you find whether any sensation or not?

A. No sensation at all on one side and very little on the other, and electricity failed to show any response.

Mr. Montgomery: That is all.

Mr. McMullen: That is all.

The hour of four o'clock having arrived court adjourned until eight o'clock tomorrow morning Tuesday, March 17th, 1925.

The hour of eight o'clock Tuesday, March 17th, 1925, having arrived court met pursuant to adjournment and the further hearing and taking of evidence was begun.

[fol. 185] And the said Dr. A. G. Osterman, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows, to-wit:

Direct examination by Mr. O. H. Montgomery:

Q. Please state your name to the jury?

A. A. G. Osterman.

Q. Where do you live?

A. Seymour.

Q. How long have you lived in Jackson County?

A. Very close on to fifty years, not quite fifty.

Q. What is your profession?
A. I am a physician.
Q. And how long have you practised your profession?
A. Since seventy-four.
Q. 1874.
A. Yes.
Q. Are you a graduate of any medical institution?
A. Louisville Medical College, yes.
Q. Doctor were you called upon to visit and examine Guerney O. Burtch in his lifetime?
A. Yes.
Q. Did you visit him and examine him?
A. I examined him at his home.
Q. And can you state about when that was?
A. No, I can't, I don't remember the date, been so long ago.
Q. Well about what month or year?
A. I think it was either January or February.
Q. After he was hurt?
A. After he was hurt, yes.
Q. And where did you find him?
[fol. 186] A. In his home.
Q. In what position.
A. He was in a chair.
Q. Was there any one with you at the same time?
A. Doctor Stem, of North Vernon.
Q. And what examination if any did you make of him at that time?
A. As I recall he had been hurt in some way about the spine.
Q. And what did you find his condition to be?
A. Well, he was suffering then from paralysis of one side, paralysed of motion on one side and paralysed of sensation on the other.
Q. On what part of his body?
A. On the lower part of his spine.
Q. Do you remember about where his injury was?
A. Well, just at the lower part of the dorsel vertebra.
Q. And what portion of the body did the paralysis include or cover?
A. If I remember right the entire right limb was paralysed.

Q. What feeling or sensation did he have in his lower limbs?

A. Well, there was paralysis of sensation but just exactly what part I do not recall, I don't remember it.

Q. What test did you make to determine whether he had any feeling?

A. Well, we tested his reflex*ed* by tickling his feet, bottom of his foot, that is the most prominent and most sensitive at that part of the body, and it was dense could not be illicited, the reflex arch had been broken.

Q. What effect did his injury have upon his kidney and bowels and bladder?

A. If I remember right he lost control of his bowels and bladder both.

Q. And what means was necessary to remove the contents of the bladder?

A. We had to catheritize him.

[fol. 187] Q. What was the effect of the paralysis with regard to the movement of his bowels?

A. He lost absolutely all control of the bowels.

Q. What was his condition with regard to suffering pain at the time you was there?

A. I do not believe he suffered much.

Q. Did he make any complaints at that time?

A. I think not.

Q. What was your judgment as to the permanency of his injury?

A. Seemed to be absolutely permanent.

Q. Would his kidneys and bladder or bowels in your opinion ever be restored to normal?

A. I think not.

Q. And what in your judgment would be the necessary outcome of his injuries and condition in which you found him?

A. These are conditions which usually go from bad to worse.

Q. And until what point?

A. They usually cause the individual's death.

Q. How long in your judgment was he likely to live in the condition in which you found him?

A. Oh, it would depend a great deal on the care given to the patient.

Q. Well give the approximate estimate of his continuance of life the condition he was in?

A. Depends greatly on the condition of the kidneys, if he had damages kidneys his period of duration of his life would be very short.

Q. What was his condition at the time you saw him with regard to needing assistance of a nurse?

A. Well he certainly needed a nurse.

Q. What was his ability to take care of his own needs and demands of nature?

[fol. 188] A. He could not take care of it without assistance.

Q. What would be his ability to dress himself or attend to any of his wants?

A. Anything he could do with his hands he needed no assistance, he could work his hands alright, use his hands.

Q. Doctor were you acquainted with the value of the services of nursing in taking care of his wants in the condition in which you saw him?

A. Yes.

Q. What in your judgment would be the reasonable compensation for a nurse in looking after his needs and in the condition in which he was when you seen him?

Mr. McMullen: We object, there has been no proof of any nurse outside of Mrs. Burtch now Mrs. Carroll, it seems she was the only nurse and the value of nursing would not be material in this case because the services belonged to the husband, the deceased Burtch.

Mr. Montgomery: I think the objection should be overruled.

The Court: Objection overruled.

Mr. McMullen: Note an exception.

(Question reread by the reporter.)

A. You want me to state the amount?

Q. Yes?

A. Ten dollars a day.

Mr. Montgomery: That is all.

Cross-examination.

By Mr. Cassius W. McMullen:

Q. How many times did you see Mr. Burtch Doctor?
A. I think I saw him twice?
Q. Twice?
A. Yes.
[fol. 189] Q. And do you recall the dates?
A. No.
Q. Do you know about how long it was after he was injured?
A. I do not know, I do not recall when he was hurt.
Q. Assuming he was hurt in 1917 in the fall of the year, can you tell us?
A. Well, we saw him right in midwinter, the temperature was below zero.
Q. Was it the following winter after his injury?
A. Yes.
Q. Do you recall whether the ribs had healed at the time you saw him?
A. No, I do not recall.
Q. Did you make any examination of that part of the body?
A. We examined his entire back from his neck on down and tested his reflexes.
Q. What I want to get at is did you find out that the ribs had healed?
A. No, I do not recall his ribs had been damaged.
Q. You do not recall the ribs had been damages?
A. No.
Q. At that time then he was suffering no pain from his ribs at the time you saw him?
A. No.
Q. There is two kinds of nerves?
A. Yes.
Q. What are they?
A. Sensory and Motor.
Q. The sensory is the one that controls the feeling?
A. Yes.
Q. The motor controls the motion?
A. Yes.
Q. Did you find both sets of these nerves were dead as far as the lower extremities were concerned?

[fol. 190] A. I do not recall how much of the sensory area was damaged, I know the motor was damaged so he could make no movement.

Q. The nerves come down inside the spine do they not?

A. Yes.

Q. Something like a telephone or telegraph wires?

A. Yes.

Q. And branch out through the holes in the spine to the different parts of the body?

A. The posterior column is occupied of the sensury nerves and the other part is the motor area.

Q. Could you tell by examination of the spine whether it damages the sensury nerves or motor nerves or both?

A. By mere examination of the spine, no.

Q. You had to test that out and make tests by the feeling or by motion?

A. Yes.

Q. Now at the point where this injury was received as you understood it and the fact that you received no response in tickling the feet or touching him in different points, you knew exactly what nerves were injured?

A. Yes.

Q. That is a sort of mathamatical fact?

A. Yes.

Q. You knew if the nerves of sensation were damages at that point or cut off that there would be no feeling at certain points of the body?

A. Yes.

Q. So that if his bowels or his kidneys and bladder refused to function you knew the nerves had been damaged at that point?

A. Yes.

Q. So that if the sensury nerves was cut off then there would be no pain as far as the bladder is concerned or any [fol. 191] organs below that point of injury?

A. Yes.

Q. So that as far as you could obtain he was suffering no pain from the bladder, kidney or bowels?

A. Yes.

Q. Even if they did not move without any functioning on his part?

A. Yes.

Q. And the same way with any part of the body below the injury?

A. Yes.

Q. I wish you would indicate on your back about where that blow was received?

A. Little below the base of the spine about the area where the ribs would leave off.

Q. About where the ribs join on there?

A. Yes, the last ribs.

Q. And so that at the time you was there you state he made no complaint of any pain?

A. No.

Q. And that was in the winter following the injury?

A. Yes.

Q. And as a physician you knew he could not suffer any pain as far as these organs was concerned below the injury?

A. Yes.

Mr. McMullen: That is all.

Mr. Montgomery: That is all.

And the said Dr. W. H. STAEMAN, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows, to-wit:

Direct examination by Mr. O. H. Montgomery:

Q. Please state your name to the jury?

[fol. 192] A. W. H. Staeman.

Q. And where do you live?

A. North Vernon.

Q. How long have you resided in this county?

A. About thirty-eight years I believe.

Q. What is your profession?

A. Practising medicine.

Q. Are you a graduate of any medical institution?

A. I am.

Q. And what is that?

A. Medical college of Ohio.

Q. And how long have you been engaged in the practice of medicine?

A. Since 1887, thirty-seven years.

Q. Doctor, did you visit Guerney O. Burtch in his lifetime after he was injured?

A. Yes.

Q. Do you recall about when it was that you made the visit?

A. I am unable to give the date, but I recall the visit.

Q. Who was with you at the time if any one?

A. Doctor Osterman.

Q. That is the witness that just left the stand?

A. Yes.

Q. And can you indicate about the month when you visited him?

A. I think it was sometime after the Holidays if I remember.

Q. Now if he was hurt the 24th of October preceding, it was some three months afterwards you saw him?

A. Yes.

Q. And where did you see him?

A. At his home.

Q. Near Commiskey?

A. Yes.

Q. And where was he in the home, in what position when you called?

[fol. 193] A. He was in bed lying on his back.

Q. Did you go more than once, you recall?

A. I do not recall but one visit.

Q. Well, now, describe what examination that was made, and in what condition you found him at that time?

A. We examined the chest and abdomen and lower limbs, we proceeded to determine whether there was any emotional sensation, we found he had sensation about down to the midline of the waist I think and at some point below that, just how far I do not recall. He had good use of his arms and could breathe naturally but no use of the lower limbs and no control over the bowels and bladder.

Q. What was your judgment from the examination you made as to whether his disability was permanent?

A. We concluded it was permanent, yes.

Q. And what would be the probable termination of his trouble?

A. A gradual lower of vitality until exhaustion developed and it did.

Q. And about how long did you judge he would live in the condition in which he was?

A. That would be merely a guess, usually sometimes these cases run six months, a year, and a half, or two years.

Q. How was the contents of his body to be removed in its paralysed condition in his bladder?

A. Involuntarily, there would be no control.

Q. That was his bowels you have in mind?

A. Yes.

Q. I am speaking of the bladder, how did he empty the bladder?

A. That differs, no control be a constant dribbling, and other times an instrument would be necessary to empty the bladder.

Q. And from the conditions in which you found him would that paralysis of the bladder and kidneys and bowels ever be overcome?

[fol. 194] A. Very rare.

Q. What was his condition with regard to needing the assistance of a nurse?

A. Well, he was in the condition that require the constant need of attendance of another person.

Q. And what would be his ability in that condition, the condition which would follow to do manual labor, earn money?

A. He could earn money only in so far as he could labor with his hands and arms.

Q. He could not in your opinion do general manual labor?

A. No.

Mr. Montgomery: That is all.

Cross-examination.

By Mr. Cassius McMullen:

Q. Doctor do you recall any complaints of pain he made at these times when you was there?

A. I think he made no complaints that I remember.

Q. Was there anything said about any ribs being broken at that time?

A. Not that I remember.

Q. So as far as you recollect the partient, Mr. Burtch, said nothing about any pain connected with his ribs?

A. No.

Q. And as far as you recollect he made no complaints of pain whatsoever?

A. No.

Q. And as a matter of fact would you saw and both what you got from Mr. Burtch was what you call subjective symptoms?

A. Yes.

Q. And what you learn yourself you call objective symptoms, you know he did not suffer any pain below certain lines?

A. Yes.

[fol. 195] Q. And for instance if there was any infection of the bladder he suffered no pain from that?

A. No.

Q. And the bowels, he suffered no pain and did not know it?

A. No.

Q. And the same way with everything below the line of the injury?

A. Yes.

Q. That would indicate to you the sensury and motor nerves was both cut off and totally destroyed at that point?

A. Yes.

Mr. McMullen: That is all.

Redirect examination.

By Mr. Montgomery:

Q. Doctor I will ask you if you went to visit him at the suggestion of the railroad company?

A. Yes.

Mr. Montgomery: That is all.

Mr. McMullen: That is all.

And the said CLIFFORD HARTWELL, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows, to-wit:

Direct examination by Mr. Montgomery:

Q. Please state your name to the jury?

A. Clifford Hartwell.

Q. Where do you live?
A. Commiskey.
Q. And what is your occupation?
A. Railroad Agent.
Q. Agent for what railroad?
A. B. & O.
[fol. 196] Q. That is the Baltimore and Ohio Southwestern the defendant in this case?
A. Yes.
Q. How long have you been agent?
A. This last time about four years.
Q. And were you the agent previous to that?
A. Yes.
Q. And when was that?
A. 1911 until 1914 I believe.
Q. Were you the agent in 1917 in October?
A. No.
Q. What was your occupation in October, 1917?
A. I was telegraph operator at that time.
Q. For the defendant company?
A. Yes, working what we call the trick job.
Q. Was you on duty on the 24th of October, 1917?
A. Yes.
Q. You may state whether or not there was a local freight train coming toward North Vernon over the defendant's railroad in the afternoon of that day?
A. There was.
Q. Do you remember about what time it was due or scheduled?
A. About twelve-thirty if I remember right.
Q. What was the fact as to whether it was on time on that day or not?
A. I think it was late.
Q. And who was the conductor in charge of the train on that day?
A. Mr. Jackson.
Q. That is Ed. Jackson?
A. Yes.
Q. You may tell the jury where the station is located and was at the time with regard to the tracks, the railroad tracks?
[fol. 197] A. Located on the west side of the main track.

Q. Then beginning with the station what track comes first?

A. What we call side track.

Q. First east?

A. Main track.

Q. And east of that is what?

A. A siding, side track.

Q. How long is that siding?

A. Probably a quarter of a mile long.

Q. And you may state whether or not it connects with the main track at both ends?

A. It does.

Q. Then what if any track is there east of the side track?

A. What we call the station track.

Q. Some times called the loading track?

A. Yes.

Q. And what was the nature of the platform, the same platform then as there is now?

A. Brick platform.

Q. How high does it extend from the level of the ground?

A. I judge about eight inches.

Q. When the local freight train came to the station that day do you remember on which track it stood or not?

A. It entered the siding I think for a passenger train.

Q. A passenger train that was going which direction?

A. West or south.

Q. You may state whether or not it remained on the siding until that train went south?

A. It did.

Q. And about what time was that train due?

A. The passenger train you mean?

Q. Yes, the passenger train?

[fol. 198] A. Something after four, about four-fifteen if I remember right.

Q. Now where did defendant's road, this branch of it terminate at the southern end?

A. Louisville, Kentucky.

Q. And where did that local freight train run to or between what points did it operate?

A. Between Youngstown and North Vernon.

Q. Where is Youngstown located?

A. That is the B. & O. freight yards in Louisville.

Q. In Kentucky?

A. Yes.

Q. You may state whether or not the defendant railroad company at that time operated both freight and passenger trains?

A. You mean on this particular branch.

Q. Did the railroad at that time operate both freight and passenger trains over its road?

A. Yes.

Q. You may state whether it carried both passengers and freight for hire?

A. It did.

Q. Were you present at any time when they were unloading this ensilage cutter?

A. Yes.

Q. What if anything did you hear the conductor Jackson say in that connection?

A. Well, I do not know as I remember all, any more than we would try and unload it over on the station track on account of being in the siding where we could not reach the platform to cross the main track.

Q. I am asking now particularly what you heard Jackson say with reference to getting some timbers if anything?

A. I don't remember whether I heard him say to get timbers or not.

[fol. 199] Q. You testified at Brownstown on the former trial of this case did you not?

A. I did.

Q. Now to refresh your memeory, I will ask you if you did not say at that time I heard him say to the crowd that was around, I don't remember how many was there, for someone to get some heavy timber to slide the cutter out off the car, but I do not recall he speaking to any particular one, to refresh your memory isn't that what you said?

A. I may have said it, I do not know, I do not remember, I don't remember all I did say there.

Q. And what did you hear him say with reference to calling for assistance in unloading?

A. I remember hearing him say that come on boys, lets unload it, or help.

Q. And to whom was that addressed to?

A. Well several standing there on the platform and around the train.

Q. Was Guerney O. Burtch standing there at the time, do you remember?

A. Yes.

Q. Now about how much in your opinion did that ensilage cutter weigh?

A. About eighteen hundred pounds.

Q. Did you help unload it?

A. Partially, I was in the car helping get it ready to run it to the door, and that is all I done to it.

Q. You did not help after it got out of the car?

A. I don't remember that.

Q. How was the ground with reference to the level of the track east of the station track or loading track?

A. That was higher than the track.

[fol. 200] Q. You may state Mr. Hartwell what if anything there was to prevent at that time the putting of this car on that stub switch or station track and unloading the ensilage cutter to the east on the higher ground?

A. Well, I do not know whether there was any more cars in the station track or not at that time.

Q. And what else if there was any cars would have prevented the putting of this car on the station track and unloading the ensilage cutter east, anything?

A. Well I do not know as there was no.

Q. Now if the local freight had been put on the main track after the passenger train passed you may state whether or not the ensilage cutter could have been unloaded on the main platform?

A. It could have been, yes.

Q. But in unloading it as it was, it had to be carried over the stub switch to the ground eastward?

A. Yes.

Q. What if any skids did the company have there for unloading freight?

A. We had what they call barrel skids, probably eight feet long, twenty-four inches wide.

Q. And you may state whether those skids were long enough to reach over this stub switch to the ground east of the car?

A. No, they were not.

Q. You may state whether or not these skids would have reached from the car door to the platform if the car containing the ensilage cutter had been put on the main tract?

A. It would, yes.

Q. And you may state whether or not they would have reached from the car door to the ground to the east if the car had been put on the station or loading track?

A. They would.

[fol. 201] Mr. Montgomery: That is all.

Cross-examination.

By Mr. Harry R. McMullen:

Q. The platform that was there in October of 1917 was that the same platform that is there now?

A. Yes.

Q. And the same heighth and condition?

A. Yes.

Q. The siding as you term it is that in the same position, the same place as it was in October, 1917?

A. Yes.

Q. And the stub is that the same as it was in 1917?

A. Yes.

Q. And the ground east of these tracks was about the same as it was in 1917?

A. Might be a little higher.

Q. Little higher now than it was in 1917?

A. Yes.

Q. About how much higher would you say Mr. Hartwell?

A. I would think three or four inches.

Q. Now what do you know as to whether or not the main track has been raised some since 1917?

A. It has been raised.

Q. How much Mr. Hartwell?

A. About seven inches if I remember right.

Q. Aside from the main tracks being raised seven inches since October 24th, 1917, and aside from the ground east of the siding being three inches higher is the heighth and the position and place of the tracks, and the platform and the surrounding ground the same as it was in October 24th, 1917?

A. Yes.

Q. If there is any other change either in the elevation of [fol. 202] the dirt around there or difference of the tracks, you may state it?

A. About the same, yes.

Q. About how high in 1917 was the average heighth of the car doors, box car doors, that is the floor of them above the platform?

A. Well, I do not know exactly but——

Q. Your best judgment?

A. About three foot and a half, possibly four foot.

Q. This siding, was that higher or lower, that is the top of the rails of that siding than the main track in 1917?

A. It was lower, I believe.

Q. The siding was lower at that time?

A. Yes.

Q. Can you give us any idea about how much, I know that is not your part of the business, give us any idea about how much?

A. Well, I would judge about eight inches.

Q. And how about the other track? you mentioned the siding?

A. The station track you mean?

Q. Yes?

A. That was the same as the siding.

Q. How many tracks in all was there there in October?

A. Three.

Q. Which you have already given?

A. Yes.

Q. By the way in 1917 what was your position with the railroad?

A. Telegraph operator.

Q. And you was telegraph operator when you testified in this trial last time?

A. Yes.

Q. Employed the same as you are now?

A. Yes.

Q. What kind of place is Commiskey, how big?

A. The population is about one hundred I believe.

[fol. 203] Q. You have to scatter around a good piece to get that many, don't you?

A. I can't say.

Q. In other words it is simply a railroad station and grocery store there?

A. Yes.

Q. It is not a recognized town with a Board of Trustees, nor a city?

A. No.

Q. Or anything like that?

A. No.

Q. These skids you speak about was that the only means of loading or unloading freight you had at this place at that time?

A. Yes.

Q. Did you have one of these little two wheel trucks or not?

A. I believe at that time we did, yes.

Q. That was just a little two wheel kind a wheel-barrow, about fourteen inches high?

A. Something like that, yes.

Q. But in unloading from the car all you had was skids?

A. Yes.

Q. No cranes or anything like that?

A. No.

Q. These skids was about how long would you think?

A. About eight foot.

Q. You had them there that day?

A. Yes.

Q. Now Mr. Montgomery asked you something about unloading this machine by these skids off the car, if the car door was four feet high and this machine weighing what you say it did and bulky, could you have got that machine out of that door and safely on to the platform with skids of only that length?

[fol. 204] A. It would——

Q. Or would that have been too steep?

A. It would have been quite a job to have done it.

Q. It would have been too steep for you men to have let that thing out?

Mr. Montgomery: We object to the attorney testifying.

(Question reread by the reporter.)

A. Well, yes.

Q. In other words that day for a shipment of that kind, whether you unloaded it on the platform or east of the

side track, you could not have done it with safety to the men there with the skids could you?

A. Well, if there had been enough around there we could, yes.

Q. In other words if there had been enough men around you would not have needed skids at all would you, your meant that?

A. No, what I mean if there was enough men there, what we call easing it down in our language, railroad language, why it could have been taken out probably without any dangers.

Q. How many men would that have been?

A. Probably took ten or twelve.

Q. How much did this weigh you say?

A. About eighteen hundred pounds.

Q. Did you see the weigh bill Mr. Hartwell?

A. I did at the time.

Q. You remember it was eighteen hundred?

A. No, I did not say it was eighteen hundred, I said about.

Q. Do you remember whether you testified about the weight before or not?

A. I don't remember.

Q. Well whether you did or not, it would have required skids other than, that is longer skids than the station skids to have unloaded it with the men who were interested in the cutter and the employees of the train and the station [fol. 205] employees, it would take longer skids than the station skids to have unloaded it with safety would it not?

A. I believe it would, yes.

Q. Did you see the skids there that day?

A. You mean our skids, the station skids?

Q. Yes?

A. Yes.

Q. Do you know whether they tried them on any of the places or not or just looked at them and saw they were too short?

A. I don't remember whether they did or not.

Q. Did you see them around the car?

A. I don't remember that.

[fol. 206] Q. You were in the car how soon after this train came?

A. I don't remember exactly.

Q. Soon after was it not?

A. About five minutes possibly.

Q. Were some of these other men, Mr. Arbuckle, either of the Arbuckles, or Mr. Burtch or any of these other men in the car when you got there? Do you remember?

A. No, I don't remember.

Q. Were they in there after or the same time that you were?

A. I don't remember who all was in the car.

Q. But there was others in there assisting?

A. Yes.

Q. What kind of car was this a local car or *weigh* car or what?

A. What we call a local *weigh* car.

Q. Explain to us what you mean?

A. That is a car that is loaded at the terminal point with different freight or different consignments at different stations, what we call a local *weigh* car, stop at different stations.

Q. When you mean terminal point——

A. One was Youngstown, Terminal point, does not mean the way car cannot be loaded any place else.

Q. The terminal point you stated to Judge Montgomery and me you mean the terminal points was Youngstown, Kentucky, or Louisville?

A. Either point, Youngstown, Kentucky is where the freight yards are located, yes.

Q. And this car with the ensilage cutter was loaded at Youngstown, Kentucky?

A. Either Youngstown or Louisville, all the same to us.

Q. Then the car came through on that train from Youngstown, Kentucky?

A. Yes.

Q. To Commiskey, where this ensilage cutter was to come as you say from Youngstown, Kentucky, to Commiskey [fol. 207] that was in Indiana.

A. Yes.

Q. Who was in charge of the train?

A. Mr. Ed. Jackson, Conductor.

Q. Now who if you recall was handling the other pieces of freight for Commiskey?

A. I don't remember.

Q. Who was the brakeman there that day?

A. Mr. Robertson was one and I don't remember who the other was.

Q. What did you do in the car, you and the men that was in there before the ensilage cutter was attempted to be unloaded?

A. I was up in the car assisting the other men getting it to the door ready to get it unloaded.

Q. There was some other freight for Commiskey in that car?

A. I don't remember as to that.

Q. How did you have to get it up to the door?

A. If I remember right I think we had what we call a pinch bar and put it under the machine and pinched it up to the door, shoved it.

Q. Have any rollers under it?

A. I don't remember whether we did or not.

Q. And these other men around there were assisting on that?

A. Yes.

Q. Now this work was this before or after there was some talk between Mr. Jackson and some of the other men out there about if it was theirs?

A. I do not think I remember that.

Q. There was some other men in there besides the train crew, however, some strangers of the company, not employees do you recall that?

A. I do not know just who they were.

Q. But there was some?

[fol. 208] A. Yes.

Q. How many men can you tell us did it take to get this shipment up to the door pinch it along?

A. Well I do not know, I don't remember that.

Q. What was the character of this shipment was it carload lot shipment or what?

A. It was L. C. L. Shipment.

Q. Some of us might know, tell what that means?

A. Less than car load shipment.

Q. Do you know anything about the rates of these L. C. L. shipments whether higher or lower?

A. Well it is a lower rate on L. C. L. than car load.

Q. You know something about the rules do you in regard to this L. C. L. Shipment?

A. A few, yes.

Q. And do you remember what one was in force and effect at that time.

A. No, I do not.

Mr. Montgomery: This is not cross examination but we do not care.

Q. Is that the——

A. I can't state definite on that, because I was not working as agent at that particular time, Green was the agent at that time.

Q. Is Rule 27 the same as the present time?

Mr. McMullen: I would not answer that.

Q. Look at rule 8-B and read that and see whether or not that was in force and effect on that day?

A. That rule was in effect on that day.

Q. At the station of Commiskey?

A. Yes.

Q. Was this what you call heavy or bulky freight?

A. Yes.

Q. And was that L. C. L. rate, whatever that would mean?

[fol. 209] A. Yes.

Q. Less than car load lots that would say?

A. Yes.

Q. And there was one part of the conversation, I believe you did not know whether you remembered or not the conversation between Mr. Jackson and the men who came there to get the cutter, do you remember of hearing him say anything to come on and help or did you remember that, or was that the thing you did not remember?

A. I remember him saying that, I do not know who to, he did not address any particular one.

Q. Then did you remember him saying anything in regard to you will you get some heavy timbers, or not.

A. I don't remember that.

Q. That is the one thing you do not remember?

A. I don't remember whether he said that or not.

Q. Who did get any timbers if anybody did?

A. I do not know as I say at the time who got the timbers.

Q. Was there some timbers brought?

A. Yes.

Q. Whoever brought them, you don't remember now who it was, what did they do with the timbers?

A. Well they put them up to the car door to use as skids.

Q. The car door in which this ensilage cutter was?

A. Yes.

Q. Did you see where they got them, did you notice that?

A. Yes.

Q. Where did they get them?

A. They got them over to the saw mill.

Q. What kind of timbers was they, give a full description of them to the jury?

A. As near as I remember, they were two by sixes.

Q. Freshly sawed or not?

A. I think so, yes.

[fol. 210] Q. Can you tell us anything about the material, the kind of timber?

A. No, I do not know as I remember what the timber was.

Q. Two by sixes and about how long?

A. Twelve or fourteen feet, if I remember.

Q. Where was Mr. Jackson or any of the regular train crew any of the brakemen when these timbers were gone after or did you notice?

A. I do not know as I remember it.

Q. Well was there any of the train crew that went after the timbers or some of the neighbors around there?

A. I do not know.

Q. And where were you when these two men who ever they may have been placed the timbers up on the car door, where was you at that time?

A. Well, as near as I remember after assisting and getting this ensilage cutter to the door I had to get out of the car and go to the office and wait on a passenger train.

Q. The timbers had been put up before that?

A. I think at that time these parties were going after them when I left the car.

Q. Did you see the timbers at any time before the accident—?

A. No.

Q. You weren't there at that time?

A. No.

Q. When the accident occurred?

A. No, I was in the office.

Q. Can you tell us where Mr. Jackson or the two brakemen of the train were when you went to wait on the passenger train?

A. Well I do not know as I remember that now.

Q. How soon afterwards did you hear of it being broken, one of the planks breaking?

[fol. 211] A. Just immediately after the passenger train passed.

Q. You went back out did you?

A. No, Mr. Jackson came in and asked me where I could find Dr. Mathews, hurt a young man out there.

Q. That was about how long after you left the car?

A. Probably two or three minutes.

Q. Did you go out there at any time before Mr. Burtch was picked up off the ground?

A. No.

Q. So you did not see him any more until he came back into the depot?

A. No.

Q. What do you call the branch there generally, east and west or north and south?

A. East and west.

Q. Now was this way car east or west of a point right straight in front of the platform?

A. It was on the west towards the west end.

Q. Of the platform?

A. Yes, of the platform.

Q. Then if you will draw a line straight out from the west end of the platform, it would have to be where the car was?

A. No.

Q. Explain that?

A. It was probably about fifteen to twenty feet, possibly more east of the west end where this car was placed.

Q. Was that the west end that is towards Louisville?

A. Yes.

Q. So that a line drawn from the west end of the platform would have hit the car somewhere?

A. You mean north and south?

Q. Line drawn straight out from the platform, the Louisville end of the platform, then that line would have hit [fol. 212] some place on the car?

A. No, the car was east about fifteen or twenty feet.
Q. The west end was east?
A. Yes.
Q. What I was driving at, to show, is where the car was with reference to the platform. How long was the platform?
A. I think one hundred and fifty feet.
Q. So the car was some place in front of the platform?
A. Yes.
Q. Now may be you can locate it better this way, the depot, place yourself at the depot and say at the front door of the depot and suppose you was walking straight out, square towards this track what part of the car would you hit?
A. You would not hit any, because it was west, beyond of the depot door.
Q. It was west of the depot door?
A. Yes.
Q. And about how far?
A. Possibly a car length.
Q. So you had to angle down to Louisville to hit the car as you went from the depot door?
A. Yes.
Q. The engineer and fireman of this train they were not back there at all, they were all on the engine as far as you remember?
A. I don't remember of seeing them there.
Q. The crew was cimply Mr. Jackson and the two brakemen as you recall it, no one extra?
A. I do not know whether he had two or three brakemen, I don't remember.
Q. How many was in this crowd Mr. Jackson was talkinto?
A. I don't remember that.
[fol. 213] Q. Some eight or ten, or do you remember or recall that?
A. Probably five or six.
Q. And Mr. Burtch was one of them?
A. Yes.
Q. Oh, he had been around there that day to see if the cutter was coming on that train, had he?
A. I think so.

Q. Do you remember of any messages being sent to Louisville whether the cutter was on that train from Louisville?

A. I do not believe I sent them.

Q. Nor you don't remember anybody else sending them?

A. No.

Q. Did you go out afterwards and work around the car any more that day?

A. I don't remember.

Q. Or were you out there afterwards?

A. I believe that I was in and out of the office, I was bury with the dispatcher.

Q. Do you remember of seeing these skids, especially the one that was broken?

A. Yes.

Q. See that any more that day?

A. Yes.

Q. When and how soon afterwards?

A. Well, probably thirty minutes after the train left.

Q. Where was it then?

A. It was laying over on the ground near the station track.

Q. It was broken at that time?

A. Yes, one of them was.

Q. If you examined that skid at that time tell the jury what you found out about the skid that was broken?

A. That particular skid that was broken had a knot [fol. 214] underneath one side and a defective place.

Q. Describe this defective place you say was underneath a little more fully to the jury please?

A. Well as near as I remember it was a knot in the timber which we could see where a limb has fallen off the tree and the tree grew over it and makes a defective place or rotten place in the timber.

Q. And this was about how long, or how big was this defective place underneath this timber?

A. Probably two inches square, inch and a half.

Q. How close was this defective place to the break?

A. Right at that place.

Q. You spoke about it being under, how do you mean it being under the timber?

A. Where it broke off that way, splintered off that way, other side, that is just an expression I used, underside,

either side would be considered the under side, depends on which way the timber was laid on, could be changed to one edge of the timber was where the defective part was, the edge of the timber.

Q. Was there anything there any marks or anything to explain to you which side the machine had been on the timber, any marks or any kind where the iron or anything hit?

A. I don't remember as to that.

Q. Maybe I am slow or dumb, but I do not get what you mean by saying the underside?

A. What I judge that to be, what I meant, this one edge, the edge of the timber is where, on one side, and the edge is where the defective part was, if I remember right.

Q. And was there anything showed on the other side of this timber of this knot?

A. I think it showed clear through.

Q. About how big through was that?

[fol. 215] A. Possibly two inches.

Q. You mean in diameter?

A. Yes.

Q. And this showed out on the edges of the plank, you remember?

A. Yes.

Q. On the edge of the plank?

A. Yes.

Q. And it showed clear through?

A. Yes.

Q. Nothing showed on the top or bottom, you recall, only at this particular point, and that was where it broke right through?

A. Yes.

Q. Did you have any trouble in discovering that knot when you went over there afterwards?

A. No, because we was looking for such as that.

Q. Did you?

A. No.

Q. You can't answer the question, you do not know where Mr. Burtch was standing from your own knowledge?

A. No.

Q. You did not see them pick him up at all?
A. No, I did not.

Mr. McMullen: That is all.

Redirect examination.

By Mr. Montgomery:

Q. Mr. Hartwell, what was the fact as to whether or not this way car in which the ensilage cutter was contained was un-coupled from the connecting cars at the other end, while standing there being unloaded?
A. I don't remember whether it was or not.
Q. Wasn't it a fact it was, there was part of the train that was uncoupled at the other end?
[fol. 216] A. I don't remember.
Q. What is the distance between the side track and the station track to the east?
A. I do not know exactly, but I guess about four foot.
Q. And what is the width of the station track?
A. You mean from rail to rail?
Q. Yes?
A. Four foot eight inches I believe.
Q. Now what was the height of the ground above the rail immediately east of the station track?
A. About five inches, possibly six.
Q. How far is the first rail of the main track east of the station platform, this way?
A. About fourteen inches.
Q. What if any inspection of these timbers did you see Jackson make at the time they were put in that car?
A. I did not see him make any.

Mr. Montgomery: That is all.

Recross-examination.

By Mr. Harry R. McMullen:

Q. Do I get it that from this station track it is only fourteen inches east of the main track?

Mr. Montgomery: The main track the first rail is fourteen inches east of the platform.

Q. These persons that came up and put the planks on the car door, did you see them make any inspection of things?

A. No.

Mr. McMullen: That is all.

Mr. Montgomery: That is all.

And the said D. M. GREEN, being first duly sworn to testify to the truth, the whole truth, and nothing but the [fol. 217] truth, relating to said cause, testifies as follows, to-wit:

Direct examination by Mr. Montgomery:

Q. State your name to the court and jury?

A. D. M. Green.

Q. Where do you live?

A. Loveland, Indiana.

Q. What is your occupation?

A. Trick operator at Commiskey for the B & O Southwestern.

Q. Were you formerly agent at the telegraph office at Commiskey?

A. Yes.

Q. How long did you hold that position?

A. From November 1914 until August, about '23 I believe.

Q. You were the station agent at Commiskey in October, 1917, then were you?

A. Yes.

Q. You remember the occurrence of an accident happening to Mr. Burtch on the 24th of October?

A. Yes, I heard of it.

Q. Did you see any part of it yourself?

A. No.

Q. Did you see him after he was hurt?

A. Not until he was at home, I saw him at home.

Q. Not there on that day?

A. No.

Q. You have been agent there for about three years before October 1917?

A. I went there in November, 1914.

Q. You may state to the jury what had been the practice without your knowledge of the defendant and it's local freight conductors at that station during the time you were station agent with regard to calling on by-standers to assist in unloading the heavy freight previous to October [fol. 218] 24th, 1917?

Mr. McMullen: We object for the reason that there has been no such custom or practice pleaded in this case. For the further reason that if there was such custom existing at this time it was in violation of the law and further reason it is not shown such custom or practice was brought to the knowledge of the defendant, furthermore, the custom has not been anywhere except at the local station at Commiskey and the witness has not shown himself to have been qualified as to the custom existing at other stations along the line of the defendant railroad company. And as suggested it is a discrimination between patrons of the road which is prohibited by Interstate Commerce Commission as set forth in their published rules and regulations.

Mr. Montgomery: Your Honor, please, we are fortunately able to have this problem solved for us. The same question was asked Mr. Green and the Supreme Court of Indiana and the Supreme Court of the United States, said it was proper.

The Court: Objection overruled with exception.

(Question reread by the reporter.)

A. I frequently heard him ask by-standers to help.

Mr. McMullen: We move to strike out the answer of the witness as not being responsive to the question.

Mr. Montgomery: That may go out.

Mr. McMullen: Did the court say it would go out.

The Court: It may go out.

Q. You state to the jury what had been the practice within the time the question was inquired about?

Mr. McMullen: We object for the reason that there has been no such custom or practise pleaded in this case. [fol. 219] For the further reason that if there was such custom existing at this time it was in violation of the law

and the further reason it is not shown such custom or practice was brought to the knowledge of the defendant, furthermore, the custom has not been shown by the question to have been anywhere except at the local station at Commiskey and the witness had not shown himself to have been qualified as to the custom existing at other stations along the line of the defendant railroad company. And as suggested it is a discrimination between patrons of the road which is prohibited by Interstate Commerce Commission as set forth in their published rules and regulations.

The Court: Same——

Mr. Montgomery: Leave that out.

Q. Mr. Green state to the jury what had been the practice within your knowledge of the defendant and its local freight conductors at that station during the time you had been station agent with regard to calling upon by-standers to assist in unloading heavy articles of freight previous to October 24th, 1917?

Mr. McMullen: We object for the reason that there has been no such custom or practice pleaded in this case. For the further reason that if there was such custom existing at this time it was in violation of the law and the further reason it is not shown such custom or practice was brought to the knowledge of the defendant, furthermore, the custom has not been shown by the question to have been anywhere except at the local station at Commiskey and the witness has not shown himself to have been qualified as to the [fol. 220] custom existing at other stations along the line of the defendant railroad Company. And as suggested it is a discrimination between patrons of the road which is prohibited by Interstate Commerce Commission as set forth in their published rules and regulations.

The Court: Overruled with exception.

(Question reread by the reporter.)

A. I have frequently heard him request by-standers to help move this bulky and heavy stuff.

Mr. McMullen: We move to strike out the answer as not responsive to the question.

The Court: It may go out.

Q. I might explain to you we are calling to your knowledge as to the practise of conductors, can you answer it in that regard, what had been their practise.

The Court: Read the whole question.

Mr. Montgomery: I might merely explain to the witness, he answered what he heard and not answered what their practice was?

Q. What had been their practise included in that question?

Mr. McMullen: We object for the reason that there has been no such custom or practise pleaded in this case. For the further reason that if there was such custom existing at this time it was in violation of the law and the further reason it is not shown such custom or practise was brought to the knowledge of the defendant, furthermore, the custom has not been shown by the question to have been any where except at the local station at Commiskey and the witness has not shown himself to have been qualified as to the custom existing at other stations along the line of the defendant railroad company. And as suggested it is a dis-
[fol. 221] crimination between patrons of the road which is prohibited by Interstate Commerce Commission as set forth in their published rules and regulations.

A. I do not see how I can answer it any other way.

Q. You may state if you know, Mr. Green, whether or not before October 24th, 1917, it had been the practise of the defendant or its local conductors in charge of freight trains in its service, during that time that you were agent there to call upon by-standers to assist in unloading heavy articles of freight?

Mr. McMullen: We are objecting in addition because this question is leading and puts the words in the witness's mouth as to what he is to answer, also the reasons stated in the other objection there has been no custom or practice pleaded in this case of such character, that it is an assumption on the part of the conductor in face of the law both of the State and of the United States, if such a thing was done, and therefore could have no weight in this case, being unlawful.

Mr. Montgomery: Withdraw the question.

Q. Mr. Green, you may tell the jury what you know about conductors in charge of defendant's freight trains, previous to October 24th, 1917, calling on by-standers to assist in unloading the heavy articles of freight at that station.

Mr. McMullen: We object for the reason that this calls for an isolated instance of that being done, to-wit: calling on by-standers for help, and assumes that there was a practice and the law governing such matters is contradictory to such practice, there has been no such practise pleaded in the complaint in this case, nor has it been shown this witness is qualified to speak of such practise that was general [fol. 222] enough to bind the defendant nor has it been shown any such practise has been brought to the knowledge of the defendant, furthermore it would be an assumption on the part of the conductor for authority which he did not have, if such isolated practise was done, because it would be a violation of the law.

The Court: Do you want the question read again? Do you want that to go out?

Mr. Montgomery: No, I want this to go to the witness.

Mr. McMullen: Mr. Montgomery wants the objection overruled and exception.

Mr. Montgomery: I want this question answered.

The Court: Objection overruled with exception.

(Question reread by the reporter.)

A. Now that is conductors?

Q. Yes.

A. Well, that is hard to answer because conductors——

Mr. McMullen: We submit the witness should answer as asked if he knows?

A. I have to make three or four answer- to that.

Q. Answer it in your own way.

A. Well, I have heard Ed Jackson call for help to unload way freight at different times, but I never have to my remembrance heard any of the other conductors call for help.

Q. About how many times?

Mr. McMullen: We object and ask that the answer of the witness be stricken out as not being responsive to the question.

The hour of twelve o'clock having arrived Court adjourned until one o'clock P. M.

[fol. 223] The hour of one o'clock P. M. having arrived; Court met pursuant to adjournment and the further taking of testimony was resumed.

The Court: Motion overruled, with exception.

Q. How long had Jackson been running on that local freight before October 1924, within your knowledge, Mr. Green?

A. I can't give you any specific time, been a few years though.

Q. Do you think he had been running practically all the time you been agent there, three years?

Mr. McMullen: We object.

Mr. Montgomery: Withdraw the question.

Q. I will ask you to state about how many years in your judgment he has been operating that local freight?

A. I would not say any specific time, I would say three or four years at least.

Q. And about how many times in your judgment had you heard him call on by-standers to help unload freight?

A. Well I do not know.

Q. Just make an extimate.

A. I would say four or five times.

Mr. Montgomery: That is all.

Cross-examination:

Mr. McMullen: That is all.

And the said RAY MOPPIN, being first duly sworn upon his oath to testify to the truth the whole truth and nothing but the truth testifies as follows, to-wit:

Direct examination by Mr. Montgomery:

Q. You may state your name to the court and jury.

A. Ray Moppin.

Q. Where do you live?
A. Three miles east of Commiskey.
Q. What is your occupation?
[fol. 224] A. Farming.
Q. Were you at the station of Commiskey on the afternoon of October the 24th, 1917, at the time when Mr. Burtch was hurt?
A. Yes.
Q. About what time did that local freight get in from the southwest?
A. Oh, as near as I can remember it was about four o'clock.
Q. And do you know the name of the conductor that was in charge of the train?
A. It was Mr. Jackson.
Q. That is, Ed Jackson.
A. Yes, sir.
Q. And you recall that there was an ensilage cutter on one of the cars on that train?
A. Yes.
Q. Did you hear Mr. Jackson say anything to anybody with reference to the unloading of the machine?
A. Yes.
Q. You may tell the jury what he said.
A. He said you fellows come and help unload the cutter.
Q. And to what persons did he direct this request?
A. The bunch that was standing there.
Q. And you may state whether or not Guerney O. Burtch was one of that bunch?
A. Yes, sir.
Q. Who if anyone in response to that request went to help?
A. There was several, I do not know just who all.
Q. Did Mr. Burtch go?
A. Yes.
Q. Did you go?
A. No.
Q. Where did you go from there?
[fol. 225] A. I went around where my team was.
Q. Then did you see any part of the proceeding in which Mr. Burtch was hurt?
A. No.
Q. Did you see him after he was hurt?

A. Not that day.
Q. So that is all you know about it?
A. Yes.

Mr. Montgomery: That is all.

Cross-examination:

By Mr. McMullen: That is all.

And the said S. T. MOPPIN being first duly sworn to testify to the truth the whole truth and nothing but the truth relating to said cause testifies as follows, to-wit:

Direct examination by Mr. Montgomery:

Q. You may state your name to the court and Jury.
A. S. T. Moppin.
Q. Your middle name is Tincer.
A. Yes.
Q. Where di you live Mr. Moppin?
A. About three miles east of Comiskey.
Q. How long have you lived — that community?
A. Thirty years.
Q. And what is your occupation?
A. Farming.
Q. Was you at the station of Commiskey on the afternoon of October 24th, 1917, at the time or about the time Mr. Burtch was hurt?
A. Yes, sir.
Q. Do you recall about what time the local freight train came in from the south that afternoon?
[fol. 226] A. It was late, I do not know what time, it was late in the evening.
Q. And who was in charge of the train as conductor as you know?
A. As I understand a man by the name of Jackson.
Q. Are you personally acquainted with him?
A. No sir.
Q. Had you seen him before?
A. Only passing through on the train.
Q. And do you know how long he had been running as conductor?
A. No I do not know.

Q. You may state what you know about an ensilage cutter having been brought in on one of the cars of that train.

A. There was one brought on that train.

Q. Now what if anything did you hear conductor Jackson say with reference to unloading of that ensilage cutter?

A. There was quite a bunch of men standing on the end of the platform when Jackson came in and Burtch said he was waiting for the cutter and Jackson said if you are in a hurry for it you had better help us unload it.

Q. Did any of the men go to assist in unloading it?

A. Yes several of them.

Q. And who went?

A. I do not know that I know all that did go, I helped some myself and Mr. Burtch and Mr. Arbuckle, maybe two Arbuckles.

Q. And did you help unload it?

A. I helped part of it.

Q. The ensilage cutter.

A. Yes sir.

Q. And what did you do?

A. I helped take out, I think the tongue and probably some of the wheels, they unloaded that on the platform side.

Q. How far did you have to carry the tongue and wheels to get to the platform?

[fol. 227] A. Just across the main track.

Q. You may state whether or not the car in which the ensilage cutter and these parts were contained was uncoupled from the rest of the train?

A. I do not know.

Q. And did you continue helping until they got the ensilage cutter out?

A. No, I did — help until they got the cutter out.

Q. Where did you go.

A. I went to help my son with a colt he had there, and started up there, we heard the train coming down and I went up there.

Q. Did you see Mr. Burtch after he was hurt that day?

A. Yes.

Q. Where was he then?

A. In the depot.

Q. Where was he lying or sitting?

A. He was laying down on the floor.

Q. What was underneath him?

A. I couldn't say.

Q. What was his condition?

A. Well I couldn't tell anything about that any more than he appeared to be suffering pretty bad.

Q. Could — tell whether or not he was helpless?

A. No, I can't say, I suppose he was, but I do not know, I am satisfied he was suffering.

Q. Did he talk any, could he speak?

A. Not to amount to anything.

Q. And did you see him taken away from there?

A. No, saw him a day or two, either the next day or the day after, probably two days after that.

Q. At his home?

A. Yes, sir.

[fol. 228] Q. What was his condition then?

A. He appeared to be in a bad condition.

Q. What was his condition, and complaints with regards to suffering pain?

A. He claimed he was suffering great pain.

Q. Do you know whether or not he could sleep at nights?

A. I don't know.

Q. And did you see him anymore after that?

A. O-, I saw him frequently after that, several times after that.

Q. While he was confined to his home?

A. Not while he was confined to his home, he was out some, I saw him after the second time, I saw him.

Q. How did he get about at the time you saw him then.

A. Part of the time I think on crutches, I seen him when I think he was on crutches, and seen him afterwards when he was on a cane, only using a cane.

Q. Was there any doctor came that afternoon?

A. No, I wasn't there.

Q. And you did not see any part of the accident?

A. No, not at the time it happened.

Mr. Montgomery: That is all.

Cross examination.

By Mr. Harry McCullen:

Q. Was you interested in the ensilabe cutter?

A. No, only I was to furnish the power to pull this.

Q. The next day?

A. Yes, I had no interest in it only to pulling the cutter.

Q. What ever you did in the way of helping unload, that was just voluntarily, just free gratis?

A. Yes, sir.

Q. What was it the different men there first started to do?

A. That is unloading the different articles, unloading the [fol. 229] small parts of the cutter.

Q. From the car?

A. Yes.

Q. That was before the fast train got along there?

A. Yes.

Q. So you walked across the main track?

A. Yes sir.

Q. How many did that?

A. I don't know, I was one, I do not know some two or three.

Q. Burtch, Arbuckle?

A. I can't say whether Arbuckle helped, I would not be positive, but the others was.

Q. Mr. Burtch was one?

A. I can't say, maybe he was in the car.

Q. What was he doing in the car?

A. Handing pieces out, part was handing pieces out, and part was carrying across the track.

Q. Then did you see them working with the ensilage cutter, pinching it up?

A. No, I never saw that, the main part no.

Q. What Mr. Jackson first said did he ask what you fellows was doing.

A. Something of that kind.

Q. And then Mr. Burtch told him, waiting for this ensilage cutter.

A. Yes. Sir.

Q. And Jackson said if you are in a hurry for it you better come and help unload it?

A. That is the way I understood it, yes.

Q. This was along about four o'clock in the afternoon?

A. I judge something near four o'clock.

Q. Day light yet?

A. Yes.

[fol. 230] Q. So you could see what you was doing?
A. Yes.

Mr. McMullan: That is all.

Redirect examination.

By Mr. Montgomery:

Q. Are you able to say whether or not Mr. Burtch was inside the car at any time?
A. No, not to be positive I would not say.

Mr. Montgomery: That is all.
Mr. McMullan: That is all.

And the said GRANVILLE ARBUCKLE, being first duly sworn to testify to the truth, the whole truth and nothing but the truth relating to said cause testifies as follows to-wit:

Direct examination.

By Mr. Montgomery:

Q. State your name to the court and jury.
A. Granville Arbuckle.
Q. And where do you live?
A. Live a half mile west of Commiskey.
Q. And how long have you lived in that neighborhood?
A. Well about, I lived there about three years at that time.
Q. And how long in this county?
A. Always lived in the county, all my life.
Q. And what is your occupation?
A. Farming?
Q. And you may state whether or not you were at the station at Commiskey on the afternoon of the 24th of October, 1917, when Mr. Burtch was hurt?
A. I was there, yes.
Q. And can you tell whether or not the local freight train from the south came in on time on that day or not?
[fol. 231] A. It came in about four o'clock, I do not know its time.
Q. You were there were you when it came in?
A. Yes.

Q. You may state whether or not Guerney Burtch was there also.

A. Yes Sir.

Q. And which track did the local freight pull up opposite the station?

A. Pulled upon the side track.

Q. And where is that side track with reference to the main track?

A. On the east side.

Q. And what other track is there there if any other besides the main track and the siding?

A. There is another track there, a spur.

Q. Where is it with reference to the side track?

A. East of the side track.

Q. Who was in charge of the local freight train on that day as conductor?

A. Ed Jackson.

Q. Do you know about how long he had been running the local freight on that road?

A. No, I do not know.

Q. Had you known of him running it for a number of years before this?

A. I knew him running before that but I do not know how long before.

Q. And is there a platform about the station, Mr. Arbuckle?

A. Yes sir.

Q. Where is the platform, or was at that time, with reference to the main track?

A. West of the main track.

Q. And what material is the platform constructed of?

A. Brick.

[fol. 232] Q. Do you know whether or not there was an ensilage cutter came in on one of the cars of that train that afternoon?

A. Yes sir.

Q. When the train pulled up on the side track you may state whether or not this car containing the ensilage cutter was uncoupled from any part of the train.

A. I couldn't say.

Q. What if anything did you hear Mr. Jackson say with reference to unloading the ensilage cutter?

A. Well, I heard him say, give us a lift, but he did not say who and that is about all *O* heard him say about it.

Q. To refresh your memory I will ask you if you did not hear him say give us a lift to unload the cutter, it is heavy?

A. Something was said about being heavy, said give us a lift.

Q. What persons did he direct that remark to?

A. He did not say, called no name*d*, just made that remark.

Q. Who was in the party or crowd to which he spoke?

A. Well, I do not remember just who was there.

Q. Name those you remember?

A. Well I don't remember just who was on the platform at that time, I think at that time some of them was in the car and I was on the platform and I think Mr. Moppin was on the platform and probably some of the railroad men, I don't remember just who.

Q. You may state whether or not Guerney O. Burtch was with you there on the platform?

A. I believe he was in the car at that time.

Q. I will ask you to refresh your memory if he wasn't*s* there with you in the crowd?

A. Refresh my memory he was on the platform at that time or not.

Q. Yes, you testified formerly in this case did you not, Mr. Arbuckle, didn't you say at that time in response to the question, did he include you and Burtch and others and [fol 233] your answer was he include- you and Burtch and others and your answer was *w*e wa*t* there and spoke to all of us.

Mr. McMullan: We object, it is leading and improper to impeach their own witness.

Mr. Montgomery: It is simply to refresh his memory. Withdraw the question.

Q. I will ask you Mr. Arbuckle if you know whether or not Mr. Burtch was ever inside the car?

A. Yes, sir.

Q. What did you do in response to this request, did you go help to unload the ensilage cutter?

A. Yes, sir.

Q. What did Mr. Burtch do?

A. I think he was in the car at the time.

Q. Did he go to help unload?

A. He was handing out some of the smaller parts before we went to unload the heavy part, I do not think he got out of the car, I don't remember not until we got ready to lay the heavy part down.

Q. To refresh your memory, Mr. Arbuckle, I will ask you when you testified before if you did not say, we started to help unload and then ask who proceeded to help unload and you said Guerney?

A. He did, but he was in the car before we started to unload that heavy part, and handing out the smaller pieces.

Q. Was you in the car?

A. No.

Q. How was the ensilage cutter unloaded from the car to the ground.

A. Well, put up some timber and slided it down a piece and it fell down the rest of the way.

Q. And was it unloaded from the car while the car was standing on the side track?

A. Yes, sir.

Q. And where did these timbers come from?

[fol. 234] A. Come from the saw mill right off the right-of-way.

Q. And was it unloaded there?

A. Yes, sir.

Q. And what if anything did you hear Jackson say about getting timbers?

A. There was something said about getting timbers, and he said that would be all right and need some timbers, or something of that kind.

Q. Just what was the language that Jackson used with reference to getting the timbers as near as you can repeat it?

A. As near as I remember he told us to get some timbers.

Mr. McMullan: We object to that.

(Question reread by the reporters.)

Q. Was that all he told you to get some pieces?

A. Well, I think someone suggested getting some pieces and he said yes get them, he said get some pieces, but I think some one asked about it before and he said get them.

Q. To refresh your memory isn't this what he said, Jackson spoke about getting some heavy pieces to run it out on, and not run it out on the skids as the skids was short.

Mr. McMullan: We object, this is putting it in an impeaching form and he cannot impeach his own witness and not the proper way to refresh a person's memory, if he did not say contrary to some thing he said now.

Mr. Montgomery: Withdraw the question.

Q. Ask you tell now all you can remember what Jackson said about getting these timbers Mr. Arbuckle, tell the jury everything that Jackson said so far as you can remember about getting these timbers?

A. Well, someone spoke about getting some timbers.

Mr. McMullan: We object to that, this gentleman is trying to give that conversation and he is asking to cut Jack- [fol. 235] son out and everything else, but the jury is entitled to the whole conversation.

Mr. Montgomery: This question is to state everything he heard Jackson say.

Q. Mr. Arbuckle will you kindly begin and tell everything Jackson said?

A. I don't remember now, I know he said to get the timbers, be all right to get the timbers, might have some timber.

Q. What did he say if anything about the company's skids?

A. Never heard him say a word about the company's skids.

Q. To refresh your memory didn't he say they were too short?

A. I don't remember now.

Q. When Jackson said to get the timbers what did you do?

Mr. McMullan: We are objection that in the first place the attorney has no right to repeat the witness' answer over, if you do repeat it right.

A. Jackson said it would be all right to get timbers.

Q. Now tell what you did following that?

A. Well, I went and got one piece.

Q. And who else went with you?

A. Mr. Burtch he got one.

Q. What was the size of these timbers?

A. Well, about two by five or sic, I don't remember just exactly, something like that, probably two by six.

Q. And how long?

A. I judge fourteen or sixteen feet.

Q. And what was the character of the timber as to being green or seasoned or freshly sawed?

A. It was fresh sawed, I can't say, rather think they was green, but I don't remember, but they was fresh sawed.

Q. And what did you do with these timbers?

A. Brought them and put one end in the car door and [fol. 236] the other end on the ground.

Q. What examination of the timbers, if any, did Mr. Jackson make at the time or after?

A. Well not any that I remember of.

Q. Was there anything put under these planks to support them between the ground and the end of the car?

A. No.

Q. And in what direction did they extend from the car door?

A. East.

Q. And what if any*thing* track did they pass over?

A. They passed over the side track or station track.

Q. Was there anything there that you know of Mr. Arbuckle, that would prevented placing the car containing the ensilage cutter on the stub switch and unloading it from that track?

A. Not that I know of.

Q. And after the passenger train south had gone was there anything to prevent having the car containing the ensilage cutter placed on the main track and the machine unloaded upon the platform?

A. Well I think not.

Q. What was done with the ensilage cutter then after it was placed, after these timbers were placed in the car door?

A. Well, it was put on the end of the timbers and started down.

Q. And how far did it get before something happened?

A. Well I judge about halfway down.

Q. Then what happened?

A. One of the timbers broke.

Q. And what became of the machine?

A. It fell over on a man at that time.

Q. And on whom did it fall?

A. Mr. Burtch.

Q. Do you know about what part of his body it caught?

A. Well it got him about here (indicating).

[fol. 237] Q. About the middle ways of the body?

A. Yes.

Q. And what effect did it have on him?

A. It mashed him down and wasn't able to get up.

Q. You may state whether or not he was pinned under the machine?

A. Yes he was.

Q. And how did he get release from that?

A. Well, some of us lifted up on it and one of the brakemen drug him out from under it.

Q. And what was his condition, was he hurt?

A. Yes he was hurt at that time.

Q. What was his ability to walk, or get up?

A. He did not try to get up or walk.

Q. Do you know whether or not he was unconscious or not?

A. No I think not.

Q. And what was done with him then?

A. Well, they put him on a cushion out of the caboose and carried him around and put him in the waiting room.

Q. What was done after that?

A. They stayed there until the doctors came.

Q. What if any complaint of existing pain did he make while you was present there?

A. Well, he seemed to suffer a good deal, he did not say much, I don't remember whether he said anything or not after they got him out.

Q. Was you there when he was taken to his home?

A. Yes.

Q. And did you go along to help take him home.

A. Yes.

Q. How did they take him home in what conveyance?

A. They carried him on the cushion, I think was carried down by several men.

[fol. 238] Q. And what was his ability to help himself when you got him home?

A. He did not seem to help himself at all, not try to help himself at all.

Q. Did you see him at any time after this Mr. Arbuckle?
A. Yes.
Q. How frequently?
A. Oh, I do not know, I suppose I saw him maybe two or three times a week for some time.
Q. At his own home?
A. Yes.
Q. And how was he as to suffering or complaining of pain when you was there?
A. Well, he couldn't hardly stand to be moved, he complained it hurt.
Q. Do you know about how long he was confined to his home?
A. No, I don't remember now, sometime before he got able to get up.
Q. Was he ever able to do any work after that?
A. No.

Mr. Montgomery: That is all.

Cross-examination.

By Harry R. McMullen:

Q. Mr. Arbuckle you and Mr. Burtch and who else was interested in this ensilage cutter?
A. Mr. Burtch and my brother, I wasn't interested in it at all.
Q. It was Everette Arbuckle?
A. Yes.
Q. There was some five or six farmers in that locality you understand was interested in it?
A. Yes.
Q. Bought it through Mr. Lurton?
A. Yes.
[fol. 239] Q. As soon as the door was open to this car Mr. Burtch and some of the rest got in to help pull things out and some of the rest carried it across the main track and put it on the main platform?
A. Yes.
Q. And you kept that up until you had all of these things out and ready to take the heavy machine out?
A. Yes.

Q. Do you remember of some swing or fan or something of that being on the cutter that had to be taken off, also that day?

A. I don't remember now.

Q. This was in a crate was it not, boards around it like you have things crated, or do you recall that?

A. I don't remember.

Q. About how big was it, how high?

A. It must have been three and a half feet I judge.

Q. And about the same length and same width probably?

A. Yes.

Q. And weighed about what would you say?

A. I do not know it was heavy, I have no idea, I suppose weighed something like they said, something like seventeen or eighteen hundred.

Q. Did you notice the men in the car pinching it along to get it to the door?

A. Well, there was several in the*ir* and I wasn't in the car myself, I did not help move it out.

Q. Then as I get this from you that it was about the time they got the little stuff cleaned out of the car that someone of the men there said something about getting some timbers to take it out?

A. Yes.

Q. And then Mr. Jackson, the conductor, said that that would be all right to get timber, and that is all you remember of what he said at that time?

[fol. 240] A. Well, at that time yes.

Q. Before that he said something to some of your folks out on the platform about it being heavy?

A. Said give us a lift, he did not say about being heavy, he said give us a lift.

Q. You and Mr. Burtch were acquainted at Commiskey at the time?

A. Yes.

Q. Knew where the saw mill was?

A. Yes.

Q. And looked around some of you and went to the saw mill and *f*ot these timbers?

A. Yes, sir.

Q. What has been your business most of your life, Mr. Arbuckle?

A. Well, farming.

Q. You have had times extra times when you wasn't farming and worked in a saw mill some?

A. I have some.

Q. Know something about timbers, both from the saw mill and on your home?

A. Yes, sir.

Q. You and Mr. Burtch when you went to that place you thought you was getting timbers of course, sufficient?

A. Yes, sir.

Q. In other words you would not have been foolish to get a couple of shingles?

A. No.

Q. You had plenty of time or daylight to see?

A. Yes.

Q. So you got a couple of timbers you thought was all right, looked all right to you?

A. Yes, sir.

Q. Those were about what did you say they were?

[fol. 241] A. I judge fourteen or sixteen feet long.

Q. And about how wide were they?

A. About two by six.

Q. You got them from a pile of timbers that was there?

A. Yes, sir.

Q. You picked up one and he picked up one and went back to the car?

A. Yes, sir.

Q. And you don't remember, or do you, I don't remember what you said about that, do you remember of putting one end of the timber up in the car or laid them on the ground for somebody else, what do you remember about that?

A. We just took them up there and laid one end in the car and the other on the ground.

Q. And then about how soon was it that they started to take the machine out?

A. Well, it was probably a minute or so, as soon as they could get it on the timbers.

Q. You and Burtch did not go in the car?

A. No, we did not go in the car after we put the timbers up.

Q. You bolks stood on the outside, with who else, if you recall?

A. Well, I don't know, Everette Arbuckle was on the other side he and I was on one side, I do not know who was helping on the other side.

Q. You and Burtch?

A. Yes.

Q. Which side was you on toward Cincinnati or Louisville?

A. Toward Cincinnati.

Q. Do you recall whether you went across to Burtch's side or he come across to yours?

A. No I don't know.

Q. Do you recall whether you done any changing at all?

A. We was both on one side, we was both on the same side, he and I.

[fol. 242] Q. And which was closer to the car, you or Mr. Burtch?

A. I was.

Q. And as it came down what were you and Burtch doing, and the other men, as it came down the skids?

A. Just aiming to hold it from turning up.

Q. The weight made it come down the skids itself?

A. Yes.

Q. Had the cutter got by you when the plank broke?

A. No.

Q. You were about how close to Mr. Burtch?

A. Well, just right by his side, foot or so from him, right by his side.

Q. And what warning if any about the plank breaking?

A. Well, there wasn't much warning to it, just broke all at once.

Q. Then did you jump one way or the other, or how did you get away?

A. I had my hand up against it this way (indicating) when it was going down, and easy enough for me to get back.

Q. You mean you was kind of steadying it as it came down?

A. Yes.

Q. You was standing a little bit away from the cutter then?

A. Yes.

Q. And how was Mr. Burtch standing?

A. Well, he took hold underneath and holding up and when it broke he did not have a chance to get back, I did.

Q. He was holding underneath to help the skid?

A. Probably.

Q. And did he have a hold underneath all the time while it was going down?

A. I can't say, when it first started it would be pretty high, when it caught him he had hold underneath.

Q. So he couldn't get away, you having hold at this place [fol. 243] you did get away?

A. Yes.

Q. Was he as tall a man as you?

A. Hardly.

Q. About what size man was he, Mr. Arbuckle?

A. I judge five feet eight inches, probably nine.

Q. Weigh what, probable at that time?

A. I judge one hundred and thirty-five.

Q. Then right after that machine fell how did you take it off of him?

A. Well, Mr. Jackson and Everette Arbuckle and myself is all I remember taking hold and lifting up and one of the brakemen just drug him out from under the cutter.

Q. You three under the excitement done some extra lifting?

A. That is all I remember having hold at that time.

Q. How did you happen to get such long timbers?

A. In order to get it across the spur track there.

Q. If you had got some six or eight foot timbers could you then have put it down on the next track or could you have got the cutter out if you had got timbers six or eight feet long only?

A. Well, I do not know, used the skids if they was going to use that short ones.

Q. You did not use that because it was practically the same as lifting it out by hand?

A. It would be almost.

Q. Now, Mr. Burtch and the other men had been waiting for this cutter for some time, hadn't they?

A. Well, I think a few days probably.

Q. You remember whether or not you learned from Mr. Burtch he was to have the use of it the next day?

A. Yes.

Q. And this was about four o'clock in the afternoon?
[fol. 244] A. Yes.
Q. That the train got there?
A. Yes.
Q. And this was what probably, four thirty?
A. Well, it wasn't later than that.
Q. Mr. Burtch lives how far from town?
A. About a quarter of a mile I guess.
Q. So that he would have had time to get the machine *to get the machine* over to his place, was your power plate already over there at Burtch's?
A. Mr. Moppin was to furnish the power.
Q. Mr. Moppin was a farmer there?
A. Yes.
Q. Mr. Burtch you have known him how long?
A. I suppose twenty years, probably longer.
Q. He had been a farmer all his life?
A. He was raised on a farm and farmed ever since he was big enough.
Q. You worked with *j*im before this had you at different places?
A. Some, yes.
Q. He was acquainted with farming and with timber that was necessarily used on a farm and things of that kind?
A. I think so.
Q. Mr. Moppin the same way.
A. Yes.
Q. In fact all of them that were around this cutter except the train men were farmers that were used to timbers and things of that kind?
A. Yes I think they was all farmers.
Q. I believe you stated these timbers were freshly sawed?
A. Yes.
Q. And if there was any defects or any weaknesses in it [fol. 245] you nor Mr. Burtch never saw it?
A. Well——
Q. And how long do you suppose you was standing by the timber that broke before it did break, watching the timber or cutter?
A. I do not suppose over a minute, just got the cutter on and dipped it down maybe three or four feet when it broke.

Q. Did you examine this plank after it broke?

A. I never, no.

Q. Any of you men around there that you can recall when you suggested about the timber and that is before Mr. Jackson said it was all right for you to get them, any of you make any remark whether you would get heavy timbers, anything of that kind, or leave it to you persons judgment about it, or anything said you recall?

A. Well, I don't remember there was anything said.

Q. Just took it for granged you fellows would get the proper kind of timber?

A. Yes.

Q. Which you thought you have done up until the time it cracked?

A. Yes.

Q. And about how close was Mr. Burtch to where the timber did crack, if you can tell?

A. Well, it must have cracked right by him.

Q. These timbers weren't painted or anything of that kind to hide any defects or anything of that kind?

A. No.

Q. And about how close to the plank was Mr. Burtch, that is the crack, how many feet, you say right by it, how many feet?

A. I do not suppose he was more than a foot or so from it.

Q. Do you know whether Mr. Burtch's eyesight was good at the time as far as you know?

A. Yes.

[fol. 246] Mr. McMullan: That is all.

Mr. Montgomery: That is all.

And the said Everette Arbuckle, being first duly sworn to testify to the truth the whole truth and nothing but the truth relating to said cause testifies as follows to-wit:

Direct examination.

By Mr. Montgomery:

Q. You may state your name to the court and jury.

A. Everette Arbuckle.

Q. Where do you live?

A. I live at Commiskey.

Q. And what is your occupation?

A. Farming.

Q. Were you at the station of Comiskey on the afternoon of October the 24th, 1917?

A. Yes.

Q. Did you assist in unloading this ensilage cutter from the car?

A. Yes.

Q. Where was the car standing at the time it was being unloaded?

A. Well, right south of the depot.

Q. On what track?

A. On the side track, middle track.

Q. You may state whether or not it had been uncoupled, the car, from any part of the train?

A. I do not think it had, I couldn't say.

Q. Who was the conductor in charge of that train?

A. Ed Jackson.

Q. And what if anything did you hear Mr. Jackson say about getting timbers, skids or planks to unload the ensilage cutter?

A. Well, I heard him say get em.

Q. Who if any one went to get them?

[fol. 247] A. Guerney Burtch and Ganville Arbuckle.

Q. Where did they get them from?

A. At the saw mill east of the depot.

Q. How far away is that mill?

A. Well, it is not very far, I do not know just how far.

Q. About what was the size of the timbers that was gotten?

A. Something like two by five or six, something of that kind.

Q. And about how long?

A. I think about fourteen feet, little better maybe.

Q. What if any inspection or examination of these timbers, after they was brought did Mr. Jackson, the conductor, make?

A. I did not see him make any.

Q. And what was done with the timbers?

A. They was placed in the door and laid across the track on the bank on the the east side.

Q. What if any support was placed under them to strengthen them?

A. There was none.

Q. Was there anything there that could have been used to support them?

A. Well, the skids, the railroad skids was laying crosswise under the other skids on the ground.

Q. And what was the nature of these timbers as to being green or fresh sawed or seasoned?

A. They were green timbers fresh sawed.

Q. Now after they were put in the car door and upon the ground what was done with the ensilage cutter?

A. Well, we rolled it out of the car on them.

Q. And how far did it proceed before the break came?

A. Well, we had the rollers under it and we rolled it down until the rollers rolled out and had to stop to put the rollers under it again.

Q. And how many feet would you estimate it?

[fol. 248] A. It was a little better than half way down, I suppose.

Q. And where were you w-ile it was going down the skids?

A. Right on the south side of the cutter holding on to it, steadying it.

Q. Who else was on your side?

A. I do not know any one on my side, there was, I reckon there was in front of me, I was steadying it, when it was standing still.

Q. And who was on the opposite side, the north side?

A. Guerney Burtch was on the north side steadying it.

Q. And then what happened?

A. Well, the piece broke and just kind of slid over and turned over on to him.

Q. You may state whether or not he was pinned under the machine?

A. Yes he was.

Q. And how was he released from there?

A. Mr. Jackson he holler to take him out, and Mr. Jackson said for God's sake lift it off of him, I stepped over the skid, I did not see my brother, I thought me and Jackson was the ones that lifted, but my brother was on the other side and we lifted up and there was a railroad man got him below the arms and drug him out.

Q. And how was he as to being helpless or otherwise after you got him out?

A. We drug him out on the ground, he seemed to be helpless, I don't remember whether they started to raise him up or laid him down, he wanted them not to lay him down, I believe he was sitting up kinda.

Q. Could he talk?

A. Yes.

Q. And where was he taken from there?

Q. Well the men went in the caboose and got a cushion and they laid him on that on the ground for a little while and sent for the doctor and then we carried him in the depot.

[fol. 249] Q. And did the doctor come?

A. Well, later I do not know just how long.

Q. Was you there when he was taken home?

A. Yes, I helped carry him home.

Q. Now, what was his condition or complaint with reference to pain and suffering?

A. Well, he suffered some and he claimed his leg I do not know which one, his left one I believe was just like stiff, did not have any feeling in it.

Q. And did you see him afterwards?

A. Yes.

Q. How frequently?

A. Well, I do not know about that, I was up there, I helped fill his silo, and I was there every few days.

Q. And what was his complaints of pain at the time you saw him following that?

A. Well, his back was the most trouble I believe.

Q. How long was he confined to his house?

A. Well, I do not know just how long, that was a right smart while.

Q. You may state whether he was ever able to perform any labor after this?

A. No.

Q. What had been his health before this, before he was hurt?

A. Well, he had good health as far as I ever know.

Q. And what was his habits with reference to being industrious?

A. He was a pretty good worker.

Q. Now Mr. Arbuckle what if anything in your knowledge was there to prevent the car containing this ensilage cutter from being placed on the stub switch and the ensilage cutter unloaded from the car to the ground there?

A. There was nothing that I know of.

Q. After the passenger train passed south what was there if anything to prevent having the car put on the main [fol. 250] track and the ensilage cutter unloaded on the platform?

A. Nothing I know of.

Q. You may state whether or not the skids of the company would have reached from the car door to the platform if the car was put on the main track?

A. Yes, they would have reached.

Q. And whether or not they would have reached from the car door to the ground if they was put on the stub switch?

A. Yes.

Mr. Montgomery: That is all.

Cross-examination.

By Mr. Cassius W. McMullen:

Q. If they had used the company's skids that would have been pretty steep to unload that cutter out of the car?

A. It would be pretty steep.

Q. Would be a matter of lifting?

A. Would be a matter of holding and letting it down easy.

Q. Going back when you was there in the first place, who all was present when the train came in that was interested in the cutter?

A. I was and Guerney Burtch.

Q. Beg Pardon?

A. I was and Guerney Burtch.

Q. Wasn't the others interested in any way in it?

A. No, only Hurten. He was the man that bought it.

Q. And when they first began to unload, some of the men that was there, whether interested in the cutter or not, got in the car, and began to hand things out?

A. I was in there myself.

Q. You was one in there?

A. Yes.

Q. Do you recall who else was in there with you?

[fol. 251] A. I do not recall, Burtch was in there.

Q. That was when you was handing out some of the small parts?

Q. I do not know about him, he was in there when they took the big part out, I do not know about the small parts, I do not know who was in there, I was in there myself.

Q. Did you help do the pinching with the bar?

A. Yes.

Q. And was Burtch there also?

A. He was there when they took the big part out, yes.

Q. And was it at that time, about the time you got ready to take the big part out of the car when something was said about getting some bigger timbers?

A. I believe we had it to the door when they talked about getting the timbers.

Q. And it was in answer to something that was said that Jackson said get them?

A. No, we had to take it across the track, he wanted to know if it made any difference to us on which side the cutter was unloaded on, and we was there for the purpose of setting it up and of course did not make any difference to us which side.

Q. And someone told you *ti* did not make any difference which side it was unloaded on?

A. Yes.

Q. And then was it when someone said, get some heavier timbers, and Jackson replied, get them?

A. I do not know whether the rest said it or not, but Jackson said get them.

Q. I thought you said in answer to Mr. Montgomery, Jackson said get them?

A. Yes.

Q. And that was referred to about the timbers?

A. He said get the timbers to reach clear across the side track.

[fol. 252] Q. You remember testifying in this case when we tried it before?

A. Yes.

Q. I want to ask you if you recollect saying this, in answer to the question by Mr. Montgomery, if you did not

say, someone said something about getting some heavier timbers to unload it and two of them got out and went and got them, you remember, your recollection about that?

A. I don't remember about that, they did not.

Q. If you said that at the other trial it was correct?

A. I do not know about that, that was my recollection then.

Q. What I mean if you said it then, it was true?

A. That is the way I recollect it then, he wanted to reach clear across the spur track to get it off the side track.

Q. Maybe you do not get the idea, I was asking about to refresh youre recollection, but somebody, and you do not know who it was, somebody said something about getting some heavier timbers and then this other remark was made?

A. I don't remember that.

Q. Why didn't you use the skids on the spur track?

A. Which skids.

Q. The railroad skids the barrel skids?

A. That would let the machine come down on the side track.

Q. They was too short?

A. Yes, that is let the machine come on the sidetrack.

Q. Wasn't that one of the things they spoke about there at that time?

A. I do not know about that.

Q. Now at the time that this talk was had about getting some heavy timbers was you and Burtch still in the car?

A. I do not know about that whether we was in the car or not, we rolled it to the door I think and then we had to get the long timbers to pry it up to get it on there to start it out.

[fol. 253] Q. And who was standing outside the car?

A. I don't remember how many was outside.

Q. About how many?

A. I don't remember but two of the railroad men and Burtch my brother and I was there, I don't remember anybody else or not.

Q. Weren't there several other- on the outside of the car, Moppin and some more that was helping unload as you handed the stuff out?

A. That was the small stuff.

Q. You and Burtch was among the last to leave the car?

A. We stayed in there until they rolled the big part of it out, of course got out to help but, I don't just remember just when we got out.

Q. At the time that this talk of timbers came up where was Jackson standing, he was outside wasn't he?

A. I do not know whether he was or not, I don't remember just where.

Q. Do you recall this, whether you and Burtch were still in the car when the talk was had about timbers?

A. No.

Q. Were you all out of the car?

A. I don't remember when they was talking about the timbers.

Q. And that time when the talk was had about the timbers, why somebody else and Burtch went and got the timbers?

A. Burtch and my brother went and got the timbers.

Q. Was there anything said about you going or directing Burtch to go or Arbuckle to go?

A. Somebody picked them to go.

Q. You mean told them to go?

A. No, not as I know of.

Q. They just simply started off and got them, at least nothing said about Burtch or Arbuckle getting the timbers?

A. I do not know who said, said get the timbers.

[fol. 254] Q. Mr. Montgomery asked you about Jackson making any examination, did you see Burtch make any examination?

A. I did not see anybody.

Q. Did not see anybody?

A. No, I do not think, I don't remember it.

Q. How far is this saw mill from the track or where the car was?

A. Well, about as far as from here across the street, I suppose something like that, well it would not be hardly that far either.

Q. Give us your best idea?

A. It is just a guess, I would not know, it wasn't very far, I would not know just how far.

Q. About where it is now at Commiskey?

A. The saw Mill?

Q. Yes, the two men that went after the planks carried the planks on their shoulder from that saw mill to that train?

A. Yes, they carried them.

Q. They put the two planks together or each man carry his own plank?

A. I think each carried his own plank.

Q. How long did it take them to come from the saw mill back to the train?

A. I do not know, would not take very long.

Q. And after the planks were laid down at the door and until the plank broke was about how long?

A. I would not know, I do not know how long.

Q. When the planks were laid down by Mr. Burtch and Mr. Arbuckle at the train, were they in plain view of everybody standing around there?

A. Which the planks?

Q. The planks they had brought from this mill, these green or fresh sawed planks, any how after they was brought there by Mr. Burtch and Arbuckle, either laid in [fol. 255] the car door or laid down on the platform until the plank broke, were they in plain view of you men that stood there and the train men and everybody else including Mr. Burtch?

A. They was in plain view of the ones that was on the east side of the train.

Q. That is where the planks were, Burtch ever on the east side of the train.

A. I do not know, he got out.

Q. He and you stood alongside the plank?

A. Yes, he carried the plank over.

Q. To clear it up you say Burtch got back in the car after he brought the plank over?

A. I do not know whether he did or not.

Q. Then how long was it from the time that the plank was brought over to the freight car by Mr. Burtch and Mr. Arbuckle until the plank broke, that it laid out there in plain view?

A. I do not know just how long, long enough to roll the machine out on it and roll it down about half way or little better, I do not know just how many minutes that was.

Q. And did you notice where Mr. Burtch stood with reference to the plank that broke?

A. I was on the south side and he was on the north side.

Q. He was right next to the plank when it broke?

A. Yes.

Q. Did you examine the plank afterwards?

A. No, I did not.

Q. Did you see it at the time?

A. At the time it broke?

Q. Yes?

A. I was on the far side, yes.

Q. Now how far were you from Mr. Burtch?

A. I was just across the cutter on the other side of the cutter.

[fol. 256] Q. These two planks were between you, that would be how far, six feet?

A. No, four, maybe.

Q. Could you reach out your hand and touch the plank that broke if the cutter had not been there?

A. I could.

Q. Before the cutter started down the planks, could you reach out your hand and touch the plank that broke?

A. Yes.

Q. Do you know whether you stood closer to the car than Mr. Burtch?

A. Well, no, I do not know about that.

Q. Do you know whether you stood closer to the place that broke than Mr. Burtch?

A. No.

Q. He was on the side that broke?

A. He was on the side that broke and I was on the far side.

Q. Was he touching the plank?

A. Not that I know of.

Q. How high were his eyes above where this plank broke, the place in the plank that broke?

A. I couldn't tell you that.

Q. Can you give us some idea?

A. I think his head was something at the top of the cutter where he was standing on the far side.

Q. Nothing on the plank, I want to get the heighth of his eyes above the spot that broke in that plank?

A. I think the plank would strike him about the knees or a little above where it br[illegible]omething like the distance from the ground.

Q. And that would be about how far from his knees up to his eyes?

A. That would depend on how high it was.

Q. You know better than I, I never saw him, just your best judgment.

A. I think he was about as tall as I am, about the size of me, maybe.

[fol. 257] Q. They can't get that in the record, how tall you are?

A. I am about five-nine I expect.

Q. And at the time that you stood on your side of your plank and Mr. Burtch and who ever was on his side with his plank, where was Jackson?

A. I think he was right near, I seen him, he was in front of the cutter after it fell over.

Q. In between the plank?

A. Something like the plank, or something that way.

Q. After it fell over?

A. Yes, I do not know where he was when it fell, he was there before, I wasn't paying any attention to him.

Q. Did you see Mr. Jackson at any time after the planks had been put up in the car and before the accident?

A. Yes, he was around there, I do not know, I did not notice what he was doing.

Q. So when you told Mr. Montgomery you did not see Mr. Jackson examining the planks, you mean you do not know anything about that, you did not see him?

A. I did not see him examine the planks.

Q. You would not say you did not see him examine the planks?

A. No, I would not say that.

Mr. McMullen: That is all.

And the said GEORGE ARTZ, being first duly sworn upon his oath, to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testifies as follows, to-wit:

Direct examination by Mr. Montgomery:

Q. You may state your name to the court and jury?
A. George Artz.
Q. Where do you live Mr. Artz?
[fol. 258] A. Commiskey.
Q. What is your occupation?
A. Farming.
Q. Do you know where the defendant railroad's station is at Commiskey, do you?
A. Yes.
Q. Was you out there on the day of the accident in which Mr. Burtch was hurt?
A. No.
Q. You may state whether or not sometime before that, you heard of that did you?
A. Yes, I heard of it.
Q. Whether or not at sometime before this accident you had bought an ensilage cutter which was delivered over the defendant railroad at Commiskey?
A. Yes.
Q. About how long before October, 1917, was it you got this?
A. Before his?
Q. Yes.
A. Three or four years.
Q. Was you at the station when it arrived on the train?
A. Yes.
Q. And who was the conductor in charge of that train?
A. Mr. Jackson.
Q. And what if anything was said or done by him at that time with regard to unloading the ensilage cutter which was for you?

Mr. McMullen: We object to that for the reason that that time is too remote from the facts in the case we are now on trial with in the four years before, because it has no bearing on the issues in this case, proves or disproves nothing, because it is a voluntary statement of a witness in no wise connected or authorized to change any rules as laid [fol. 259] down by the laws of the Interstate Commerce Commission and because it is a matter that is not stated in the complaint in this case and is misleading and prejudicial.

The Court: Objection overruled.
Mr. McMullen: Note an exception.

(Question reread by the reporter.)

Q. That is Mr. Jackson?
A. Well he said it is heavy piece of machinery and of course it was necessary for several fellows to unload it, he said take hold boys, naturally all took hold.
Q. And did you take hold and help unload it?
A. I helped unload.
Q. What did the bystanders do at that time?
A. They all helped.

Mr. Montgomery: That is all.

Cross-examination by Mr. Harry R. McMullen:

Q. This was some four years before Guerney Burtch was hurt?
A. Three or four years before I said.
Q. And another ensilage cutter?
A. Yes.
Q. And another owner?
A. Yes.
Q. It was heavy was it at that time?
A. Yes.
Q. Was that less than car-load lots or what do you know how that was shipped?
A. We unloaded it as local freight, we unloaded it from the local right on the brick platform.
Q. How many of you?
[fol. 260] A. I don't remember, six or eight, maybe not that many.
Q. What kind of cutter was that?
A. Deran.
Q. One of those ordinary cutters?
A. This weighed twenty-eight hundred.
Q. Twenty-eight hundred pounds?
A. Yes.
Q. That was necessary for how many men to——
A. All that could help, I don't remember how many.
Q. Do not know how many?
A. No.

Mr. McMullen: That is all.
Mr. Montgomery: That is all.

And the said CHARLES F. LURTEN, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testified as follows, to-wit:

Direct examination by Mr. Montgomery:

Q. You may state your name to the court and jury?
A. Charles F. Lurten?
Q. Where do you live?
A. Commiskey.
Q. How long have you live there?
A. About forty years.
Q. What is your business?
A. Merchant.
Q. How long have you been engaged in the merchandise business at Commiskey?
A. Nearly forty years.
Q. What other business if any have you had during your residence there besides being a merchant?
[fol. 261] A. I was railroad agent, Postmaster, Township Trustee.
Q. For what length of time were you agent for the railroad?
A. Why, I was agent, and assistant agent about twenty years.
Q. And what railroad company was that?
A. The first, the O. & M. and then the Baltimore and Ohio Southwestern.
Q. The same company that is defendant in this case, that is when it was under the name of the Baltimore and Ohio Southwestern?
A. Yes.
Q. And when you was assistant who was the agent?
A. My father was agent.
Q. For what length of time was he agent?
A. I think about fourteen or fifteen years.
Q. And when did your agency terminate, what year?
A. Terminated I think about 1912, I am not sure.
Q. You may state to the jury your knowledge of the facts what the practise was while you was agent of the defendant

company for its freight conductors with regard to calling for assistance in unloading the heavy articles of freight at that point at the station of Commiskey?

Mr. McMullen: We object because it is not brought down or not covering the period when this accident happened, no pleading covering this particular question. As there is no allegations in the complaint concerning the custom and it is not within the issues presenting the practise that existed in 1912 and prior thereto.

The Court: Objeetion overruled with exception.

(Question read by the reporter.)

A. It was a very common occurrence with conductors to ask bystanders to help unload the heavy freight.

Q. Do you recall the circumstance of Mr. Burtch being hurt in the unloading of an ensilage cutter there in October?

[fol. 262] A. Yes, I remember it.

Q. How far was your store from the depot?

A. The depot, about six feet, something like that.

Q. And what if anything do you know the practice of conductors and of the defendant railroad company in charge of its local freight trains calling on by-standers to assis- in unloading heavy freight since the time you were agent?

A. Yes.

Mr. McMullen: We want to object, there is no time fixed except since the time he acted as agent.

Q. And before the happening of the accident to Mr. Burtch?

Mr. McMullen: We want to object, there is no time fixed except since the time he acted as agent.

The Court: Objection overruled with exception.

(Question reread by the reporter.)

A. Yes, it has been a very common occurrence since, ever since I have been there.

Q. To whom was the ensilage cutter consigned that was delivered there on the 24th day of October, 1917?

A. It was shipped to me.

Q. And where did you obtain the ensilage cutter, from what point?

A. Shipped from Louisville, Louisville, Kentucky.

Q. You may state what if any notice was given to you by the defendant company to unload that ensilage cutter?

A. Well, there was none.

Q. You may describe to the jury the platform and tracks at the station there at Commiskey, as they were in 1917 and at the time of this accident?

A. There was a brick platform at the depot, I suppose one hundred feet or longer, the main track first, next to the platform, and then the regular switch, the passing and stub switch still east of this.

[fol. 263] Q. And how high was the surface of the brick platform above the general level of the ground?

A. I suppose seven or eight inches something like that.

Q. Did you order the ensilage cutter that was bought for Mr. Arston.

A. Yes.

Q. Were articles of freight commonly unloaded at that station?

A. There on the platform by the depot.

Q. Was you at the station at the time this ensilage cutter arrived on the train?

A. Yes, I went over to see if it had come but I did not stay, I was busy and went back to the store.

Q. And on what track did the freight train stop?

A. It seems to me like it pulled in the main siding or passing switch.

Q. Do you know whether or not the car in which the ensilage cutter was carried was uncoupled from the other part of the train or not?

A. I do not know about that.

Q. Can you give the jury any reason within your knowledge why this ensilage cutter could not have been unloaded on the main platform?

A. No, I know of no reason why it could not have been unloaded on the platform.

Q. You may state if you know whether or not the local freight was on time that afternoon?

A. No, I think it was late.

Q. About how much late?

A. Well I think three or four hours something like that.

Q. And you may state what if any reason there was

within your knowledge why the car containing the ensilage cutter could not have been placed on the stub switch and the ensilage cutter unloaded to the ground on the east?

A. I know of no reason why it could not have been.

Q. Were you present at the time that Mr. Burtch was hurt?

[fol. 264] A. No, I did not see him hurt, saw him afterwards.

Q. Where was he when you saw him?

A. In the depot, waiting room.

Q. Tell the jury in what condition he was at that time?

A. He was lying there on the cushion, I think out of the caboose, seemed to be suffering greatly, very badly hurt.

Q. What was his ability to speak or talk if you know?

A. He could talk a little, I talked to him just a word or two, asked him how he was feeling.

Q. And where was he taken from there?

A. He was taken home from there I think from the depot.

Q. You may state whether you had an order for this ensilage cutter at the time you bought it?

A. Yes.

Q. And who were the persons who were to become the purchasers of it from you?

A. Mr. Burtch, Mr. Arbuckle, and Mr. John Wells, and I am not sure there was one or two more, but I am not sure, who they were, I remember those three.

A. And to whom was the bill of lading for the cutter made out to?

A. Me.

Q. Could you tell the jury about what it's weight was?

A. Well, it was somewhere seventeen or eighteen hundred pounds, I think.

Q. What was the business or occupation of Mr. Burtch?

A. Burtch was a farmer.

Q. What were his habits in regard to industrious?

A. Very good, he was what you call an industrious man.

Q. He has since died?

A. Yes.

Q. And what family did he leave?

A. He left a wife and two children.

[fol. 265] Q. What are the children boy and girl?

A. Boy and girl, yes.

Q. The little boy here is this one of them.

A. Yes.

Q. What was his disposition and conduct in regard to his family?

A. Very good I think, I think he was a good provider, took a great interest in his family.

Q. You may state whether or not he was ever able to do any manual labor after the injury received on this occasion?

A. No.

Q. Do you know about how long he was confined to his home from the injury?

A. Well several months, I do not know, several months, see him at the store, going on crutches and a cane, I do not know just how long it was he got out after the accident.

Mr. Montgomery: That is all.

Cross examination.

By Mr. Harry R. McMullen:

Q. You visited his home did you often before this injury?

A. Not often, go down there once every two or three months probably I would be at his home.

Q. On social calls or business?

A. Yes, business calls usually he done his trading with me.

Q. He visited at your home?

A. Well, sometimes.

Q. Socially always?

A. Yes.

Q. He and his wife both?

A. Yes.

Q. And how soon after the injury did he come back to your store?

A. Well, I think it was several months, I couldn't say.

Q. Back on crutches at first?

[fol. 266] A. Yes, I think so.

Q. And then later on with a cane?

A. Yes.

Q. He lived there in that vicinity up until the time of his death?

A. Yes, sir.

Q. And he did not labor any after his injuries?

A. No, he never did.

Q. But otherwise his mind was alright as far as he was concerned?

A. Yes, his mind was alright.

Q. And the only disability you know of was the physical disability?

A. Yes, the physical disability.

Q. You say this was shipped to you?

A. Yes.

Q. Have you your bill of lading with you?

A. No, I have not, no.

Q. Shipped to C. F. Lurten, Commiskey, Indiana?

A. Yes.

Q. Do you know it was the Western Implement Company of Louisville that sent it?

A. Yes, ordered from the Western Implement Company at Indianapolis and had a warehouse at Louisville.

Q. Do you know what date they advised you it had been shipped?

A. No, I do not know, usually get a bill of lading maybe a day before, something like that.

Q. And this ensilage cutter was shipped out of Louisville the day before it arrived by the Western Implement Company?

A. Yes.

Q. And come in from Louisville in this car on this train Mr. Jackson was in charge of?

A. Yes, he was the conductor.

Q. That weighed seventeen hundred and ninety-five pounds?

A. In that neighborhood, seventeen or eighteen hundred pounds.

[fol. 267] Q. What else was there with it?

A. I do not recollect anything else, only pipe, conductor pipe that runs to the top of the silo to blow the ensilage in.

Q. That had no connection with the cutter?

A. Yes, it is connected with the cutter and the ensilage blew through that to lift it up into the silo.

Q. Was the wheels also with it, frame, table, tongue and all that?

A. Yes.

Q. This came in on skids?

A. Yes. It never came in with wheels on it, wheels are always off.

Q. Now you spoke about calling for help, when did this company you are speaking of, the Baltimore & Ohio Southwestern Railroad Company, when did they operate that road?

A. When did the Baltimore and Ohio?

Q. You are talking about the Baltimore and Ohio Southwestern Railroad?

A. Yes.

Q. When did they operate that road?

A. Well, I don't remember the O. and M. and the Baltimore and Ohio took it.

Q. I am talking about the Baltimore & Ohio Southwestern?

A. You say when did they operate it?

Q. That is the question, in what year that is what I want to know?

A. I couldn't say what year, I know they was operating it shortly after the year 1900, but I am not sure.

Q. When did they quit?

A. I do not think they have ever quit still call the Baltimore and Ohio.

Q. I am talking about the Baltimore and Ohio Southwestern, you know, two different names?

A. Yes.

[fol. 268] Q. Now when did the Baltimore and Ohio Southwestern operate anything on that road through Commiskey in your recollection there and your knowledge as agent?

A. Well sometime during the year 1900, called it the Baltimore and Ohio Southwestern.

Q. 1900, this is 1925 now?

A. Yes, sometime that year, I can't tell you the year.

Q. You testified they were operating in 1917 didn't you?

A. Yes, well I do not know, this the Baltimore and Ohio or Baltimore and Ohio Southwestern.

Q. That is what you testified to?

A. I am not sure that I did, the names are so near alike, I don't remember.

Q. So you do not know whether in 1917 or for six or eight years before that, that the Baltimore and Ohio Southwestern had any conductors down there do you?

A. I couldn't tell you the exact year.

Q. How did you happen to say to the jury you heard conductors down there of the Baltimore and Ohio Southwestern give orders to the farmers to help unload freight, and did not know there was any Baltimore and Ohio Southwestern down there?

A. I did know there was a Baltimore and Ohio Southwestern.

Q. In the five years before 1917?

A. I do not believe I said Baltimore and Ohio Southwestern.

Q. Do you say it now?

A. No.

Q. But you did say you heard frequently conductors of the Baltimore and Ohio Southwestern give orders to bystanders to unload freight?

A. No, I did not say the Baltimore and Ohio Southwestern, I said that railroad only one railroad along there.

Q. It wasn't the O. and M. was it?

[fol. 269] A. Yes, I guess I heard the O. and M. say the same thing.

Q. That was way back there went way back twenty odd years ago, what I am getting at, this is a suit against the Baltimore and Ohio Southwestern Railroad Company, you understand that don't you?

A. No. I do not know whether it is against the Baltimore and Ohio Railroad Company or the Baltimore and Ohio Southwestern Railroad Company.

Q. Did it make any difference to you when you testified about who was running that road when you talked about the conductors of the defendant giving these orders, make any difference to you what the name was?

A. No.

Q. Do not care now?

A. No.

Q. Would not care it it was the O. & M.

A. No.

Q. It had not been the Baltimore and Ohio Southwestern since way before the war?

A. No, I don't remember the years.

Q. Then you do not say now do you, that since, before the war you have heard any conductor of the Baltimore and Ohio Southwestern, Ed. Jackson or anybody else giving any orders to anybody down there about loading or unloading the freight?

A. Yes.

Q. Since the war?

A. Yes.

Q. Employees of the Baltimore and Ohio Southwestern?

A. Yes.

Q. Since when did you find out the Baltimore and Ohio Southwestern was running a train there?

A. I did not refer to the Baltimore and Ohio Southwestern.

Q. That is what I am asking about?

[fol. 270] A. I can't give the date, what date they changed the names.

Q. I do not know whether I understand you, but I think I do, as far as you know there has not been the Baltimore and Ohio Southwestern railroad company, has not been operating that road through Commiskey since before the war, since the commencement of the war as far as you know?

A. No.

Q. Then how do you say, if you do not know that company is running that, that the conductors of the Baltimore and Ohio Southwestern Railroad since before they began the war had been giving these orders?

A. I did not say the Baltimore and Ohio Southwestern Railroad.

Q. And you do not know now?

A. I know these conductors——

Q. But you do not know they were Baltimore and Ohio Southwestern people do you?

A. I can't say to that.

Q. Yet you answered Mr. Montgomery right away?

A. I did not know whether the Baltimore and Ohio or not.

Q. When you answered without knowing who the defendant was didn't you?

A. No, I did not, yes, I did not know who the defendant was.

Q. Is there anything else you answered you do not know for sure about, so we can correct it up?

A. I do not know you might ask me.

Q. You say there was no notice given to you to unload?

A. No.

Q. Well the train was in there and the cutter was unloaded before you could hardly lick a postage stamp wasn't it?

A. No, I can't say as to that, I think they was a good little bit in unloading it, several minutes.

Q. And how there wasn't time to go to the Postoffice and [fol. 271] get back, get it back to you?

(Witness did not answer.)

Q. How long is that skid down there?

A. I judge seven feet long.

Q. Do you remember testifying before at Brownstown?

A. Yes, I remember testifying, yes.

Q. Do you remember what you put it there then?

A. No, I do not.

Q. Have you seen the skids since?

A. Yes, I seen them.

Q. And your recollection, your judgment now is about what?

A. Somewhere seven or eight feet long.

Q. How high was the car door at that platform, ordinary car?

A. Oh, about three and one half feet something like that, you mean from the platform to the car door?

A. To the floor?

A. Platform to the car door run three and one half to four feet.

Q. What kind of car, box car?

A. Yes, box car, yes.

Q. So that it would have been perfectly safe in your judgment and easier would it to have unloaded an eighteen hundred pound cutter on the skids that were there at the station to the platform?

A. Yes, I think so.

Q. It would have been mostly lifting it?

A. No, I think not, I know we unloaded other heavy loads, we unloaded cutters before on skids to the platform.

Q. What do you call three and one half feet (indicating) it would be only about four foot out from the bottom of the car, straight up and down, if the skids were up there they had to go on the floor?

A. Yes.

Q. And out on the platform, they would only be four [fol. 272] feet from the bottom of the car to the end of the skids?

A. Yes.

Q. You think that would be very easy?

A. It would not be easy, it would be the best way I know of unloading on the spur.

Q. It would have been much easier would it not if the skids that were used had been stout to go down more on the level, wouldn't it?

A. To the platform you mean?

Q. No, over on the other place?

A. No, I think the skids would have been too short for that.

Q. If the skids they had that Burtch went to the lumber yard to get, if they had been safe it would have been much easier to take a thing down in that way, down gradually than to take it down an eight foot skid?

A. Yes, if they were heavy enough, braced properly.

Q. I am ta-king about if braced?

A. Yes.

Q. Good deal easier to take it out that way?

A. Yes.

Q. A good deal easier to put it on the platform?

A. Yes.

Q. A good deal easier to take it over and load it on this spur track?

A. Yes, if they had longer skids?

Q. So the only difference was the skids was not stout enough that was the only thing?

A. Yes.

Q. In other words from your knowledge of loading freight and unloading if the skids had been strong enough it was unloaded the easiest and safest way wasn't it?

A. Yes.

Mr. McMullen: That is all.
Mr. Montgomery: That is all.

[fols. 273-275] Mr. Montgomery: We want to read the interrogatories of the plaintiff and the defendant's answers thereto, which said interrogatories and answers were read by Mr. Meloy and reas as follows, to-wit:

Defendant's answers to interrogatories omitted. Printed side page 77 ante.

[fol. 276] Mr. Montgomery: The plaintiff now offers and desires to read in evidence the transcript of the proceedings had in this cause in the Jackson Circuit Court, as certified by the Clerk of the Court.

Mr. McMullen: To which defendants object for the reason that the so called transcript does not show this to be the same case as originally instituted in the Jackson Circuit Court, under the title of Guerney O. Burtch versus the Baltimore and Ohio Southwestern Railroad Company, nor does the record show that Lula A. Carroll as administratrix of the estate of Guerney O. Burtch, deceased, the present plaintiff in the cause now on trial to be authorized as administratrix to prosecute any suit on behalf of the estate of Guerney O. Burtch, deceased, or to prosecute any continuation of any cause arising out of the injury and death of Guerney O. Burtch, who was the original plaintiff in the cause entitled Guerney O. Burtch, versus the Baltimore & Ohio Southwestern Railroad Company formerly pending in Jackson Circuit Court, and the record further shows that any case arising out of the injury and death of Guerney O. Burtch against the Baltimore & Ohio Southwestern Railroad Company is barred by the Statutes of Limitation. We further object to that part of the record showing the proceeding and judgment, and each word and phrase and line thereof separately and severally for the reason that said cause of action abated at the time of the death of said Guerney O. Burtch, plaintiff's decedent in the cause now [fols. 277-293] on trial. And there was no third paragraph of complaint on file in any cause on account of the injury or death of Guerney O. Burtch at the time of his death.

Mr. Montgomery: The purpose of this is to show this is the same case that it was taken within the statute of limitations and has since been continued and while it was pend-

ing the original plaintiff died and this administratrix was substituted, we are obliged to show this by the record, and that is the purpose of the allegation of the complaint.

The Court: Objection overruled with exception.

Which said record of the Jackson Circuit Court reads as follows:

Read by Mr. Harry Meloy:

Record from Circuit Court of Jackson County omitted. Printed side page 4 ante.

[fols. 294-299] Mr. Montgomery: We desire to introduce in evidence certified transcript of the proceedings had in this cause in the Supreme Court of Indiana.

Which said transcript reads in the words and figures following to-wit:

Read by Mr. Harry Meloy:

Proceedings in Supreme Court omitted. Printed side page 41 ante.

[fol. 300] Mr. Montgomery: We desire to introduce in evidence certified transcript of the proceedings had in this cause in the Supreme Court of the United States.

Mr. McMullen: We object to the introduction of the transcript from the Supreme Court of the United States because it does not go to prove any issues in this cause in that the transcript shows that one Lula A. Burtch was substituted as administratrix or executrix of the estate of Guerney O. Burtch deceased, whereas the cause on trial is Lula Carroll, administratrix of the estate of Guerney O. Burtch, deceased, and it does not therefore prove or dis-
[fol. 301] prove any of the issues in the cause now on trial.

The Court: Go ahead with exception.

Which said transcript of the proceedings had in this cause in the Supreme Court of the United States, reads in the words and figures following, to-wit:

SUPREME COURT OF THE UNITED STATES

At the Capitol of the United States, in the city of Washington, and District of Columbia, being the present seat of

the National Government of the United States, on the first Monday of October, (being the 3rd day of the same month) in the year of our Lord one thousand, nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-sixth, The Supreme Court of the United States met agreeable to law.

And thereafter the following entries appear of record.

SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 115.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Petitioner,

vs.

LULA BURTCH, AS ADMINISTRATOR OF GUERNEY O. BURTCH, Deceased.

DOCKET ENTRIES

1922. Sep. 2—Petition for writ of certiorari and exhibit thereto filed.
Oct. 2—Notice of submission of petition and proof of service of same and of petition filed.
Oct. 3—Petition submitted.
Nov. 13—Writ of certiorari granted.
[fol. 302]
Dec. 2—Writ of certiorari issued.
1923. Jan. 2—Writ of certiorari and return filed.
Feb. 20—Motion of respondent to substitute Lula Burtch Adm'x etc., as a party respondent filed.
Feb. 20—Ordered that Lula Burtch, Adm'x of Guerney Burtch, be substituted as the party respondent.
Dec. 3-4—Argues.
1924. Jan. 7.—Adjudged to be reversed with costs and remanded.
Feb. 13—Mandate to P. J. Lynch, Clerk.

SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 577

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Petitioner,

vs.

GUERNEY O. BURTCH.

The petition for a writ of certiorari herein was submitted to the consideration of the Court by Mr. Morrison R. Waite for the petitioner.

October 3, 1922.

SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 577

[Title omitted]

ORDER ALLOWING CERTIORARI

On consideration of the petition for a writ of certiorari [fol. 303] herein to the Supreme Court of the State of Indiana, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby granted.

November 13, 1922.

SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 577

[Title omitted]

ORDER SUBSTITUTING PARTY RESPONDENT

On motion of Mr. A. A. Wheat in that behalf, Lula Burtch, executrix of the estate of Guerney O. Burtch, deceased, was substituted as the party respondent herein.

February 20, 1923.

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 115

[Title omitted]

ARGUMENT AND SUBMISSION

The Argument of this cause was commenced by Mr. William A. Eggers for the petitioner, and continued by Mr. Oscar H. Montgomery, for the respondent.

December 3, 1923.

[fol. 304] SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 115

[Title omitted]

The argument of this cause was concluded by Mr. Oscar H. Montgomery for the respondent.

December 4, 1923.

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 115

[Title omitted]

JUDGMENT

On Write of Certiorari to the Supreme Court of the State of Indiana.

This Cause came on to be heard on the transcript of the record from the Supreme Court of the State of Indiana, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court for further [fol. 305] proceedings not inconsistent with the opinion of this court.

January 7, 1924.

Certificate to foregoing papers omitted in printing.

The hour of five o'clock P. M. having arrived court adjourned until tomorrow morning, Wednesday, March 18th, 1925, at nine o'clock A. M.

The hour of Nine o'clock A. M. Wednesday, March 18th, 1925, having arrived, court met pursuant to adjournment and the further hearing of evidence was resumed.

Mr. Montgomery: We want to read the testimony of Guerney O. Burtch, given in the former trial, taken from the bill of exceptions in the original transcript.

[fol. 306] Which said testimony of Guerney O. Burtch is read by Mr. Meloy, and is in the words and figures following, to-wit:

Guerney O. Burtch, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination:

By O. H. Montgomery:

Q. State your name to the jury?
A. Guerney O. Burtch?
Q. Where do you live?
A. About a quarter of a mile right west of Commiskey.
Q. What is your occupation?
A. I was a farmer until I got hurt. I haven't done anything since.
Q. How long have you been engaged in farming?
A. All my life. Ever since I was big enough to work.
Q. You own a little farm by Commiskey?
A. Small farm. Yes, sir.
Q. What was the condition of your health previous to October 24, 1917?
A. I was able to work and take care of my farm and support my wife and children.
Q. You have two children?
A. Yes, sir.
Q. Your little boy was born since you were hurt?
A. Yes, sir.

Q. Were you over at Commiskey on the afternoon of the 24th of last October?

A. Yes, sir.

Q. Were you there at the time a local freight train came in from the south?

A. Yes, sir.

Q. About what time did it arrive?

A. About four o'clock.

[fol. 307] Q. Do you know what time it was due?

A. Between 12 and 1 o'clock. I would not say exactly for I do not know.

Q. Were you there at the station when it came in?

A. Yes, sir. Right there on the platform.

Q. What kind of a platform does the company have there?

A. Brick platform.

Q. About how high is it?

A. Ten or twelve or *more* have been fourteen inches. Something like that though.

Q. When the train came did you learn that it was carrying the ensilage cutter?

A. Yes, sir.

Q. Did you know that it had the cutter on it before it got there?

A. Not until we got to Commiskey.

Q. Did you know Ed. Jackson, the conductor of the train?

A. Yes, sir.

Q. Was he in charge of the train that day?

A. Yes, sir.

Q. What if anything did he say to you or to you and other about helping him unload that cutter?

A. The train pulled in and someone said something about the cutter being on the train and he said, "Come on and give us a lift, it is heavy."

Q. To whom did he direct that?

A. There was Arbuckle and Everett Moppin and Ray Moppin and myself standing on the platform there in a little bunch.

Q. Who if any of you, went in response to that request?

A. All except Ray Moppin.

Q. Where was the car in which the cutter was at that time?

A. On the sidetrack about opposite the platform.

Q. When you went, to what point did you go?

[fol. 308] A. There was some little stuff that had to be unloaded that was in the way and that was carried across the main track and I was in the car and helped to hand that out.

Q. After that was gotten out of the way, what did you do then?

A. They had a pinch bar and two little rollers about ten or twelve inches long and they pried the crate up and put the rollers under it and rolled or pushed it up toward the door.

Q. When they got it to the door, what if anything else did Jackson the conductor say?

A. Said we would have to have some plank that would reach across the stub switch.

Q. Was there any reason or cause if you know, why it could not have been unloaded on the platform?

A. No, sir. Not that I know of.

Q. What if any skids or apparatus did the company have there with which to unload the ensilage cutter?

A. Nothing except the ordinary skids. Barrel skids I believe is what they call them.

Q. State whether or not they were long enough to carry the cutter across the track?

A. They were not. That was why Jackson wanted the plank.

Q. What did he say about the heavy plank?

A. He said, "We will have to have some heavy plank and said to go over and get some.

Q. Where did he mean for you to go?

A. He pointed toward the saw mill.

Q. Was the saw mill near by?

A. Yes, sir.

Q. Who went over there after these planks?

A. Granville Arbuckle and myself.

Q. What did you get?

A. We got two pieces, if I remember right, they were [fol. 309] ten or twelve feet long and 3½x5 inches think. I don't remember just exactly.

Q. What did you do with them?

A. Took them to the car and put one end in the car and the other across the stub switch. The one end laid east of the stub switch.

Q. What examination did Jackson make at that time to ascertain whether or not they were sound or otherwise strong enough to support the — of the machine?

A. He looked at them and kind of tested them and worked his foot up and down to see and said they would hold.

Q. Is that all the examination he gave them?

A. That is all.

Q. Said they would hold it up?

A. Yes, sir.

Q. What if any proper support did they put under them?

A. Everett Arbuckle wanted or did put one of the barrel skids under there and wanted someone else to take the other end and put it on edge to support the plank but they said no, that they did not nedd it.

Q. The ensilage cutter was then moved out on the plank?

A. Yes, sir.

Q. Go on and tell what was done next.

A. I had hold of the crate in which this cutter was crated and was easing it down as best we could and got it about two thirds of the way down when the skid broke and caught me and crushed me down.

Q. How were you working at the time, easily or otherwise?

A. There was no rough treatment. We were just letting it down easy as we could. There was no jerking of any kind.

Q. How far was it going?

A. It was very slow. We were very easy with it for one man could not have pulled anything like that by himself.

Q. It crushed you down to the ground?

A. Yes, sir.

[fol. 310] Q. How many brakemen or other helpers of the train crew were there besides Jackson?

A. Three brakemen.

Q. Were they helping?

A. They were around the cutter, supposed to be. They were all right there by the crate.

Q. Was that all of the train crew?

A. That was all that was there. Jackson and three brakemen that I remember anything about. The engineer and the fireman were some place else. Not there anyway.

Q. This track referred to as the stub switch is connected with the main track at both ends?

A. I think it is.

Q. Was there any reason there that day why this car in which the ensilage cutter was, could not have been set over on the stub switch?

A. Plenty of room over there for eight or ten cars.

Q. You may state how that would have effected or eliminated the danger of unloading the ensilage cutter if the car had been placed over there?

A. Might have been possible for them to use their own skids for the — over there is about as high as the platform.

Q. Did Jackson give any reason why he did not unload it on the platform?

A. No, sir.

Q. Do you know where articles of freight were usually unloaded at that station?

A. I have seen them unload different things on the platform, that is articles of freight.

Q. What was done after you were hurt?

A. I remember hearing Jackson say, "Lift, Men, Lift," and some of them took hold of the crate and lifted it off of [fol. 311] me and another man pulled me out from under it.

Q. Then where were you taken?

A. They laid me on the ground and then carried me to the depot.

Q. How long was it before a doctor came?

A. Not very long. Probably a half hour. Maybe not so long. I hardly knew I was suffering so badly.

Q. What was your condition as to suffering with pain?

A. Very severe.

Q. Where did you hurt?

A. My ribs were fractured or broken and my back hurt me so that I could not be still or lay still and I could not move, I hurt so bad.

Q. When the doctor came did he administer to you in any way?

A. He gave me some kind of medicine to quiet my pain. I don't know what it was and he injected morphine or something like that in my arm.

Q. Then where were you taken?
A. They placed me on a cot and took me home.
Q. What time did you get home?
A. It was a little after dark?
Q. What physician attended you?
A. Dr. Robertson and Dr. Mathews went home with me.
Q. Dr. Robertson is the company doctor at Deputy?
A. That is my understanding.
Q. He was not called by you?
A. No, sir.
Q. How long did Dr. Mathew continue to look after your condition?
A. I could not say exactly. Two or three months I suppose.
Q. How long were you confined to your home before you got out?
A. From the 24th of last October until between the 20th and the last of February.
Q. How long did this intense pain continue?
[fol. 312] A. That severe pain lasted two or three weeks.
Q. How did that effect your ability to sleep or rest?
A. I could not be still to sleep or anything else. I could not turn for a while unless someone turned me and I would want to be turned thinking I would get easier and then it was just the same thing over again. I could not rest anyway I laid.
Q. What was the condition of your right leg immediately after the injury?
A. I could not move it at all.
Q. What was the condition of your left leg?
A. I could not move it very much. Just slightly.
Q. You could move it?
A. Just a little bit.
Q. What if any feeling did you have in the left leg?
A. Very little below the knee.
Q. What was the condition of your bladder?
A. My bladder seemed to be paralyzed and my urine had to be drawn all of the time.
Q. Does that condition continue yet?
A. Yes, sir.
Q. How often each day do you have to remove the water that way?
A. Five or six times. Something like that.

Q. What was the condition of your bowels?

A. They have been paralysed all of this time.

Q. What control do you have over their action?

A. None.

Q. What feeling or sensibility do you have in the lower organs of your body?

A. None.

Q. When did you begin going out on crutches?

A. I used crutches probably along the middle of February, I began to learn to use them then.

[fol. 313] Q. Do you have any feeling now in your left foot or leg?

A. My left leg has better action.

Q. The feeling has improved in that one?

A. Not in the foot——

Q. What about your right leg, do you have better action in that?

A. Slightly. It has never regained its size.

Q. It has shrunken?

A. Quite a bit.

Q. Have you been taking treatment of anyone with a view of improving your condition?

A. Yes, from an osteopath.

Q. What doctor?

A. Dr. Morrell of Columbus.

Q. How old are you?

A. Thirty-two my last birthday in February.

Q. What day?

A. Twelfth.

Q. What work have you been able to do since you were hurt?

A. None whatever.

Q. Can you state what amount of expense you are out for medical attention since you have been hurt?

A. No, sir. I could not state the exact amount. Something like two—three hundred dollars I suppose.

Q. Do you suffer any pain at this time?

A. Yes, sir.

Q. Where is that?

A. In my back and different parts of my body.

Q. Are you able to wait upon yourself and administer to yourself without help?

A. It just depends. I am able to draw my urine myself.

Q. This ensilage cutter that you spoke of was bought by Mr. Lurten?

A. Yes, sir.

[fol. 314] Q. And what interest were you to have in it after it was delivered to him?

A. One seventh.

Q. Had you expected to use it as soon as it came?

A. Yes, we had been looking for it for two weeks.

Q. Do you know about what that ensilage cutter would weigh?

A. 18—2,000 pounds something like that.

Cross examination.

By H. McMullen, Atty. for the def.:

Q. You went to Commiskey that day to get an ensilage cutter?

A. I did not know it was there until I got there.

Q. There you learned that it was to be on that train?

A. D. M. Green informed me that it was on that train.

Q. Who first started the talking there between you and Jackson?

A. I could not tell you who it was.

Q. Do you remember whether someone asked whether the cutter was there or not?

A. Someone did I think.

Q. Then Jackson said that it was heavy and for you to give him a lift?

A. Yes, sir.

Q. At that time the train was over on the side track?

A. Passing track or switch they call it.

Q. The middle track?

A. Yes, sir.

Q. Was the car about opposite the depot?

A. I think just a little bit south.

Q. Then as soon as he could "Give us a lift" you went over to the car?

A. Yes, sir.

Q. Who got to the car first?

A. I believe I did.

[fol. 315] Q. Some of the brakemen were there too?

A. If I remember right they were.

Q. Then you started to putting things out of the car onto the platform?

A. Yes, sir.

Q. Did you use the company skids on that side that day?

A. I think we did for there was two or three barrels of vinegar.

Q. It is about the same distance from the main track over to the passing track as it is from the passing track to the stub switch?

A. Ordinary space between the tracks.

Q. Did you use the company skids to take out those barrels?

A. Yes, we used them but you understand they did not reach to the platform.

Q. Not quite long enough for that?

A. No, sir.

Q. They reached about to the rail?

A. I suppose over the rail in the main track.

Q. Afterwards when the skids were placed on the north side they reached to the spur rail, did they.

A. They reached the same distance on either side.

Q. They reached one way as far as they did the other?

A. Sure.

Q. Did you help move the ensilage cutter while you were in the car?

A. Yes, sir.

Q. You were pinching it along?

A. I don't think I used the pinch bar. I had hold of the crate and somebody else was doing that.

Q. You saw them pinch it along?

A. Yes, sir.

Q. Why didn't you take and pry it along without the rollers?

A. It was too heavy.

Q. You knew it was pretty heavy when you were in the car?

[fol. 316] A. It laid on the floor pretty close.

Q. Who first mentioned the skids, that you would have to get some other skids?

A. Mr. Jackson if I remember right.

Q. What is your best recollection?

A. That it was Jackson.

Q. Is there a fan on that cutter?
A. What they call a blower or fan.
Q. Did that stick outside the crate?
A. I don't remember whether it did or not.
Q. From what you know of the cutter and the say they are made what would you say of the size of it?
A. I don't know exactly but I judge it was forty-five inches across. That is just a guess.
Q. Was there anything said there that about the possibility of the fan being bent in any way?
A. I don't remember about it.
Q. Do you remember Jackson saying that the fan might get injured?
A. No, sir.
Q. You don't remember about that?
A. No, sir. I don't remember saying anything about it.
Q. When did you go get the skids? After the cutter was up to the door or while they were moving it up?
A. After it was up to the door.
Q. Then it is your recollection that Jackson said we will have to have some heavy skids?
A. Yes, sir.
Q. The Company's skids were already there on the car door over the spur track?
Q. Did you say they reached the far rail on the main track?
A. No, sir.
Q. The Company's skids were already there on the car door over the spur track?
Q. Did you say they reached the far rail on the main track?
A. No, sir.
Q. If they reached the far rail on the main track, they [fol. 317] would reach the rail on the stub switch, wouldn't they?
A. I don't remember that they touch the far rail though.
Q. You meant they reached the rail nearest the passing track?
A. The first rail would be next to the switch.
Q. In other words you meant to say that you used them that way to take the barrels out of the car?
A. Yes, they used them to take the barrels out on the west side.

Q. In other words when you used those company skids that day when you were unloading toward the platform, one end rested on the car and the other rested on the far rail?

A. No, sir. I don't remember that it reached to the far rail.

Q. Did you not state that they would not reach to the platform but did reach to the rail?

A. I did not understand which rail you meant.

Q. That is about two feet away from the edge of the car?

A. Farther than that.

Q. How far is it?

A. Three or four feet.

Q. The company skids reached from the car about three or four feet out?

A. Yes, and maybe more.

Q. The track is four feet, eight and a half inches wide?

A. I don't know anything about it.

Q. Going back to the other side of the car, the company skids were over there before you went for the plank?

A. Believe they were.

Q. Do you know who put them there?

A. No, sir.

Q. They reached out toward the east?

A. Yes, but I don't know who put them there or how far they went out.

Q. At that time the cutter was there near the door ready [fol. 318] to be unloaded?

A. Yes, I rather think it was.

Q. Do you remember that anyone said anything about the fan at that time?

A. No, sir.

Q. Then it was Jackson that said that they would have to have some heavy skids?

A. Yes, sir.

Q. Did he just say that to the crowd?

A. He said he would have to have some heavy skids and turned to Arbuckle and I and we went and got them.

Q. The rest of the men that had been helping were around there?

A. Yes, sir.

Q. Then you and Arbuckle went over to the saw mill and got some plank?

A. Yes, sir.
—. What kind of material did you get.
A. Poplar.
Q. Was it dried or seasoned?
A. No, sir.
Q. Green or just cut?
A. It had not been cut more than a day or two.
Q. This was about what size?
A. Three and a half by ten or twelve feet long.
Q. How far did they reach?
A. Far enough to reach to the bank.
Q. What would you say, How far is it?
A. The bank is just outside of the rail.
Q. About how far?
A. Twenty inches or two feet from the outside of the rail.
Q. How high is the bank?
A. About as high as the platform on the other side?
[fol. 319] Q. You brought these over?
A. Yes, sir, I brought one and Arbuckle brought the other.
Q. What did you do with them?
A. They were placed on the door of the car.
Q. Did you have some help?
A. I could not say. I don't remember.
Q. Do you remember whether or not you were towards North Vernon or on the other side?
A. No, sir. I don't remember.
Q. As soon as they were brought did you put the cutter on them?
A. There were some in the car and rest of us stayed on the outside.
Q. How did you hold it?
A. We had hold of the crate and pulled easily on it.
Q. Was there anything else done after you got the plank and laid them in the door?
A. That was all there was to do, that is put the cutter on and pull it out.
Q. When you put these plank up there, then did someone lift it, that is the cutter up on the plank?
A. I don't remember whether they did or not but I suppose they did.
Q. Anyway you got it on the plank——
A. Yes, sir.

Q. What kind of plank were you told to get?
A. Heavy.
Q. You knew what it was for?
A. Yes, sir.
Q. You knew that it was so heavy that they had to use rollers under it?
A. That was the way they handled it in the car.
Q. After you — this on the plank you started it down, you on one side and some of the other men on the other side?
A. There were men all around it.
Q. And the railroad skids were still up there?
[fol. 320] A. I suppose they were.
Q. You never saw anyone take them away?
A. No, sire.
Q. Were they up there all the time?
A. I rather think not.
Q. Do you know how they finally got down?
A. No, sir, I don't know who took them down.
Q. But they got down someway or other?
A. Yes, sir. But I do know that Arbuckle had hold of them.
Q. What did he do with them?
A. He fixed it around with his hands and pulled it with his foot.
Q. Where did he get it?
A. It was someplace near the car.
Q. You remember seeing him have hold of it?
A. Yes, sir.
Q. Then someone pulled it out?
A. Yes, sir.
Q. The machine continued to come down?
A. We eased it down as best we could.
Q. It got about half way down before it broke?
A. Two thirds of the way down or something like that.
Q. Then it broke and fell on you?
A. Yes, sir.
Q. Was there anything about these skids that looked weak in anyway?
A. No, sir.
Q. You went over to this long yard to get some heavy timber heavy enough to unload this cutter on?

A. We got the best there was there or we thought we did anyway.

Q. Since your injury you have had Dr. Robertson part of the time?

A. He never made but one visit.

Q. He is where?

[fol. 321] A. Deputy.

Q. And he did not visit you?

A. He only made the one visit.

Q. Did you have Dr. Mathews?

A. Yes, sir.

Q. Is he your family physician?

A. Yes, sir, he is.

Q. He attended you altogether? There was no one else gave you any medical attention?

A. That is all except Dr. Osterman and Dr. Staeman who examined me a couple of times.

Q. When did they examine you?

A. Along towards the last of December and then about two weeks later.

Q. That last of December and the middle of January?

A. I don't remember the exact date.

Q. By that time you had been going around on your crutches some?

A. No, sir.

Q. When did you first start to walking on crutches?

A. Probably after the middle of January sometime.

Q. Did Robertson examine you that one visit he made?

A. Yes, sir.

Q. Dr. Staeman and Dr. Osterman did not give you any treatment?

A. No, sir.

Q. Did the osteopath at Columbus?

A. He came down to see me a little over two weeks after I got hurt but he did not give me any treatment then.

Q. You were in pain?

A. Yes, sir.

Q. Have you seen him since?

A. Yes, sir.

Q. When?

[fol. 322] A. A few days ago.

Q. How often have you seen him?

A. I have been up there several times to take treatments.
Q. Went to see him?
A. Yes, sir.
Q. The last time was when?
A. Last Saturday.
Q. He is at Columbus now?
A. Yes, sir.
Q. When did the pain begin to let up, that is the severe pain?
A. As soon as the soreness left I did not have such severe pain?
Q. You were pretty much bruised?
A. I don't know whether I was bruised but I was awful sore.
Q. Your ribs hurt you a good deal?
A. Some but I had so much other suffering that I did not notice them.
Q. You started to go about on crutches about when?
A. About the middle of January, just in the house.
Q. Sometime after Dr. Staeman and Dr. Osterman were there?
A. Yes, sir.
Q. And you have been going since?
A. As I got better I could go more.
Q. How soon was it after your injuries that you first began to be able to work your right foot and to have some use of it?
A. It must have been three months.
Q. Sometime last January?
A. Yes, sir.
Q. And you have been trying to use it?
A. Been trying to use it and get it to do all I could.
Q. And Dr. Mathews has been watching that too, has he?
A. He has examined me on several different occasions.
Q. Has he noticed any improvement in that leg?
[fol. 223] A. Noticed a little bit.
Q. Your general health and muscles are better?
A. Little bit, yes.
Q. Your muscles get rather flabby after you lay around without working?
A. Sure they do.

Q. But your legs are a little better and your general health is better and your appetitie is better?

A. My right foot does not gain scarcely any.

Q. It has gained some in motion, hasn't it?

A. Hardly noticeable.

Q. You heard Dr. Mathews say your improvement was marked?

A. No, sir. He said it was noticeable.

Q. That is the same doctor that has been to see you?

A. Yes, he is our family physician.

Q. You heard him testify here this morning?

A. Yes, sir.

Q. Your left leg, how is that?

A. It has gained some.

Q. Better in motion and in sensation?

A. It has gained a little more in motion than it has in sensation.

Q. It has been seven months since you were hurt?

A. I expect it has.

Q. During that time you have regained some motion in your right foot and some motion and sensation in your left leg?

A. Some little, yes.

Q. Your left gained more than your right?

A. Yes, sir.

Q. And your appetite is more than it was?

A. My appetitie is not more than half what it was before I was hurt.

Q. It has got better than what it was when you were first hurt?

[fol. 324] A. Yes, of course.

Q. You don't have to have poached eggs all of the time now, do you?

A. I can't afford them.

Q. All this osteopath does is to manipulate the joints and muscles in the body?

A. Yes, sir.

Q. He don't give you any medicine?

A. No, sir.

Redirect examination.

By O. H. Montgomery:

Q. You understood that Dr. Staeman examined you for the defendant company?
A. Yes, sir.
Q. He was not your surgeon?
A. No, sir.
Q. Can you stand alone?
A. I can't stand still, I have to have something to hold to.
Q. You can support your weight, can't you?
A. Yes, but I can't stand still.

And the said, LULA CARROLL, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testifies as follows, to-wit:

Direct examination.

By Mr. Montgomery:

Q. Please state your name to the jury?
A. Lula Carroll.
Q. What was your name before it became Carroll?
A. Burtch.
Q. You were the wife of Guerney O. Burtch were you?
A. Yes.
Q. And you are now the administratrix of his estate?
[fol. 325] A. Yes.

Mr. McMullen: We want to object to this question for the reason that that is a fact which must be proved otherwise than by parol evidence, that the records so far at least fail to show her appointment or substitution as administratrix.

Objection overruled with exception.

Q. When were you married to Mr. Carroll?
A. December 25th, 1923.
Q. Did you testify in this case at the trial at Brownstown?
A. Yes.
Q. And are you the same person that is mentioned in the record read to the jury yesterday, Lula Burtch?
A. I am.

Q. When were you and Mr. Burtch married?
A. December 17th, 1913, I believe.
Q. And where did you and he live during your married life?
A. On a farm just west of Commiskey.
Q. And what was his occupation during that time?
A. Farming.
Q. What was the condition of his health during your acquaintance with him up to October 24th, 1917?
A. His health was good.
Q. What was his habits with regard to industry, work?
A. He worked all the time.
Q. Now did an accident happen to him on the 24th of October, 1917?
A. Yes.
Q. When did you first learn of that Mrs. Burtch?
A. Soon after it happened.
Q. Did you see him before he was brought home?
A. I did not.
Q. How was he brought home?
[fol. 326] A. He was carried on a cot.
Q. Do you remember who carried him or brought him?
A. I don't remember.
Q. Do you remember whether or not the doctor was there, came with him?
A. I think he was.
Q. Then where was he placed, what was done with him when he got home?
A. He was left on the cot and set in the room.
Q. How long did he remain on the cot?
A. I don't remember, but as soon as he could be moved, we changed him on to a bed.
Q. What was his condition at that time with regard to being helpless or able to move?
A. He could only move his hands.
Q. What if any part of his body was paralysed?
A. Seemed to be paralysed from his waist down, partially.
Q. What was his ability to move his right leg?
A. I couldn't just remember, but there was one leg he couldn't move.
Q. And how was the movement in the other?
A. Just, he could slightly move his foot.

Q. And what if any feeling did he have in either of his legs or feet?

Mr. McMullen: I believe at this time we will object for the reason that there are two causes of action set forth in the complaint, we are not now aware of which theory the plaintiff will pursue and we are therefore objecting because if one theory or cause of action is pursued that this evidence will be immaterial, proving or disproving no issue and misleading to the jury, prejudicing the cause of the defendant, and also objecting because all matters sought to be [fol. 327] *il*licited by this question and other kindred matters go to make up the cause of action which abated at the death of decedent and it is a departure from the original complaint as filed in this cause to which the present one is an amendment. And because the claim to support which this evidence is sought to be *il*licited is barred by the Statute of Limitations. And furthermore the record so far introduced by plaintiff fails to show this to be an action for the same injuries for which judgment was recovered by decedent in a former action and because the original complaint, I mean to say the original amended complaint, the complaint that is now before the court filed, amended complaint is in the name of Lula O. Carroll, and the record from the Jackson Circuit Court which has been read to the Jury by the plaintiff and which is the proper way of proving the record and what took place in the Jackson Circuit Court, each and every item and entry of each proceeding out there is in the name of Lula A. Burtch, administratrix of the estate of Guerney O. Burtch, deceased, which entry being made after the marriage of the witness now on the stand and after the filing of the amended complaint in the name of Lula A. Carroll, Administratrix of the estate of Guerney O. Burtch, deceased.

Mr. Montgomery: Your Honor this objection goes to the competency of this witness to testify as to his physical condition and suffering after he was hurt and brought to the house. Most of their argument is a matter that raises legal questions in instructions to the jury as to what they can [fol. 328] consider and take in account as to the questions of damages. One reason, sufficient reason this should be overruled is they permitted the same testimony to go in of Doctor Agosterman and Doctor Mathews and Doctor Stem,

and the Arbuckles, Moppins and all the others that testified as to pain and suffering and disability and there is nothing more asked this witness than the other witnesses that have already testified, so when they let matters go in without objection, then it is too late to raise the objection at this time. In any event this testimony is in support of the allegations of the complaint and the jury will be properly instructed at the right time as to what they may consider what the cause of action is now pending, so I do not think there is no doubt it is perfectly competent for this witness to testify the same as the other witnesses.

The Court: It may go in with an exception.

(Question reread by the reporter.)

A. Very little in any.

Q. What was the condition of his kidney and bladder?

A. They seemed to be paralysed.

Q. Could he empty his bladder in the usual way or require other means?

A. It did.

Q. And what was the condition of his bowels?

A. They were paralysed.

Q. And you may state whether or not he had any control over the movement of his bowels?

A. None at all.

Q. And what was necessary to be done in order to protect him against involuntary action?

[fol. 329] A. He had to be cared for just as a little child.

Q. Who nursed him and looked after him during his illness?

A. I did.

Q. What pain did he suffer during the early part of his life after the injury both in the day time and at night time?

A. He suffered both day and night.

Q. And what was his ability to sleep?

A. At first he could not sleep without something to quiet his pain.

Q. And how long was he confined to his bed and to the house?

A. I do not just remember hos lon*w* he was in bed, but he wasn't out of the house to amount to anything until sometime the latter part of February, or first of March.

Q. And after he got out of bed and was able to move about what means did he move, to help support his body?

A. Crutches.

Q. Was he able at any time to dispose of the crutches?

A. Yes.

Q. And then how did he support himself?

A. With a cane.

Q. Did the condition of his bladder or bowels at any time get better?

A. No.

Q. You may state what if any work he was able to do after he was hurt?

A. Nothing only what he could do with his hands.

Q. What if any additional help did you need in the household during his disability?

A. I had to have someone to do my work while I waited on him.

Q. About how long did Doctor Mathews look after him when he was first injured?

[fol. 330] A. I don't remember.

Q. Who else did he see or treat him when he was hurt?

A. You mean after he was able to get out?

Q. Yes?

A. He went to Columbus and took treatments.

Q. From whom?

A. Doctor Mauer, an osteopath.

Q. About how many trips did he make to Columbus?

A. I don't remember.

Q. Where else did he go for treatment if you know?

A. Indianapolis, Seymour and North Vernon.

Q. Do you know about how many trips he made to Indianapolis for treatment?

A. I can't remember now.

Q. Can you give an estimate of how many trips he made to Seymour?

A. No, he made several trips there and stayed several days at a time.

Q. Can you tell the jury in your judgment about how much expense he incurred for assistance and treatment and incidental expense in going to and from the places where he was treated on account of his injuries?

A. I did not keep any record of it, but I judge something near five hundred dollars.

Q. How did his condition continue to be as time ran on, got better or worse?

Mr. McMullen: We object at this time for the reason that there are two causes of action set forth in the complaint, we are not now aware of which theory the plaintiff will pursue and we are therefore objection because if one theory or cause of action is pursued that this evidence will be immaterial, proving or disproving no issue and misleading to the jury, prejudice the cause of the defendant, and [fol. 331] also objecting because all matters sought to be *il*licited by this question and other kindred matters go to make up the cause of action which abated at the death of decedent and it is a departure from the original complaint as filed in this cause to which the present one is an amendment. And because the claim to support which this evidence is sought to be *il*licited is *is* barred by the Statute of Limitations. And furthermore the record so far introduced by plaintiff fails to show this to be an action for the same injuries for which judgment was recovered by decedent in a former action and because the original amended compleint, the complaint that is now before the court filed, amended complaint is in the name of Lula A. Carroll, and the record from the Jackson Circuit Court which has been read to the Jury by the plaintiff and which is the proper way of proving the record and what took place in the Jackson Circuit Court, each and every item and entry of each proceeding out there is in the name of Lula A. Burtch, administratrix of the estate of Guerney O. Burtch, deceased, which entry being made after the marriage of the witness now on the stand and after the filing of the amended complaint in the name of Lula A. Carroll, administratris of the estate of Guerney O. Burtch, deceased.

The Court: Same ruling and same exception.

(Question reread by the reporter.)

A. There seemed to be a slight improvement for a while and then he did not get any better.

Q. And when did he die?

[fol. 332] A. February 10th, 1921, I believe.

Q. Do you remember when you was appointed as administratrix?

A. I don't remember the date.

Q. A few days afterwards?

A. Soon afterwards.

Q. And you are still acting as administratrix?

A. Yes.

Q. Now if you know, you may state what was the cause of his death?

A. From these injuries as far as I know.

Q. What family did he leave at the time of his death?

Mr. McMullen: We want the same objection as before. We object for the reason that there are two causes of action set forth in the complaint as amended and each paragraph of complaint, we are not now aware of which theory the plaintiff will pursue and we are therefore objection because if one theory or cause of action is pursued that this evidence will be immaterial, proving or disproving no issue and misleading the jury, prejudicing the cause of the defendant, and also objection because all matters sought to be illic-ted by this question and other kindred matter go to make up the cause of action which abated at the death of decedent and it is a departure from the original complaint as filed in this cause to which the present one is an amendment. And because the claim to support which this evidence is sought to be illicited is barred by the Statute of Limitations. And furthermore the record so far introduced by plaintiff fails to show this to be an action for the same injuries for which judgment was recovered by decedent in a former action and because the original complaint, I mean to say the original amended complaint, the [fol. 333] complaint that is now before the court filed, amended complaint is in the name of Lula A. Carroll, and the record from the Jackson Circuit Court which has been read to the jury by the plaintiff and which is the proper way of proving the record, and what took place in the Jackson Circuit Court, each and every item and entry of each proceeding out there is in the name of Lula A. Burtch, administratrix of the estate of Guerney O. Burtch, deceased, which entry being made after the marriage of the witness now on the stand and after the filing of the amended

complaint in the name of Lula A. Carroll, Administratrix of the estate of Guerney O. Burtch, deceased.

The Court: That may go in. Same objection, same ruling, same exception.

(Question reread by the reporter.)

A. Myself and two children.
Q. You were his widow?
A. Yes.
Q. And what are the names of the two children?
A. Lois and Robert.
Q. How old was Lois at the time of his death?
A. Almost six.
Q. How old was Robert at the time of his death?
A. Just a few days past four months.
Q. When was Robert born with reference to the time of receiving his injury?
A. He was born in February after his father was hurt in October.
Q. These children are still living are they.
A. Yes.
Q. Are these the children that are sitting behind me?
[fol. 334] A. They are.

Mr. Montgomery: That is all.

Cross-examination.

By Mr. Harry R. McMullen:

Q. Your name I believe is Lula A. Carroll now?
A. Yes.
Q. Formerly Lula A. Burtch?
A. Yes.
Q. You were married to Mr. Burtch when was it you stated?
A. December 17th, 1913, I believe, twelve or thirteen.
Q. And lived together up until his death?
A. Yes.
Q. You lived where?
A. Just went of Commiskey on a farm.
Q. That is Commiskey, that is in Jennings County, Indiana?
A. Yes.

Q. You own your own farm?

A. When did you get that farm?

A. The farm belonged to his father and he bought out the other heirs part of them.

Q. Bought them out?

A. He owned part of the farm.

Q. And bought out the rest of the other heirs?

A. Yes.

Q. And that was after you were married or before?

A. Just before.

Q. So he owned the farm at the time of your marraige?

A. Yes, part of it, his father lived with us, after we was married and he owned part of the farm himself.

Q. What kind of a farm, how much of a farm?

A. Ninety-five acres altogether.

Q. And that was the farm that you lived on at the time of his death?

[fol. 335] A. Yes.

Q. General farmer was he, farmed all the time?

A. Yes.

Q. And at times worked, swapped work with others, that was the custom in the neighborhood?

A. Yes.

Q. What other kind of work did he do?

A. I don't remember him doing anything outside the farm work, except hauling.

Q. Hauling what?

A. Logs, or on the road at times when he could spare the time.

Q. Hauled logs for other- or for himself?

A. Sometimes for himself and sometimes for others.

Q. Hauling the- to Commiskey or someplace else of that kind?

A. Usually to the saw mill or to Commiskey to be loaded on cars.

Q. And he did all of his part that a man does in loading and unloading logs?

A. I don't remember, I wasn't there.

Q. How long was he engaged in hauling to the saw mill?

A. I can't remember, just hauled a day or two when ever he would have the time and would be himself not working.

Q. You was busy about your own affairs as a house wife and did not pay attention to it?

A. Yes.

Q. And you became Mrs. Carroll when?

A. December 25th, 1923.

Q. You live where Mrs. Carroll?

A. I live four miles north of Holton, Indiana.

Q. On a farm there?

A. Yes.

Q. Living with your husband?

A. Yes.

[fol. 336] Q. Is he here?

A. No.

Q. Have been living there with Mr. Carroll as husband and wife since this December 25th, 1923?

A. Yes.

Q. Mr. Burtch continued to live in Jennings County up until his death?

A. Yes.

Q. And as far as the business affairs he tended to them did he after he got so he could get out?

A. He could manage but he couldn't work.

Q. That is what I meant, the business part, the management part, in other words there was nothing the matter with his mind in any way?

A. No.

Q. You knew of the purchase of an interest in this cutter?

A. I heard him speak of it.

Q. And been looking for the cutter some days had they not?

A. I think so.

Q. About how long, do you know?

A. No, I don't remember.

Q. The cutter Mr. Lurton spoke about was the same, the same persons?

A. Yes.

Q. And that was his business at Commiskey that day?

A. Yes.

Q. You spoke of his physical health, was his eyesight good?

A. As far as I know.

Q. Never saw anything wrong?
A. No, he had worn glasses at one time but did not wear them at this time.
Q. Never heard any complaint of poor eyesight before this injury?
A. No.
[fol. 337] Q. Active as a man of his age?
A. Yes.
Q. Normally active?
A. Yes.

Mr. McMullen: That is all.

Redirect examination.

By Mr. Montgomery:

Q. Mrs. Carroll what was Mr. Burtch's disposition towards his family and children?

Mr. McMullen: We object to that question for the reason that the law of Indiana is one cannot recover for anything except pecuniary damages, that is damages must be paid in cold cash and that for loss of society, loss of pleasure or association there cannot be no recovery under the law of the State of Indiana or under the Federal law. And that there is no allegation in the complaint supporting evidence of this kind and this objection is made separately and severally as to each paragraph of the amended complaint.
Mr. Montgomery: I know your Honor I am within my rights, and will not take any time, I will withdraw the question, and leave it right here. If the Court please the plaintiff will rest at this point.

And thereupon plaintiff rested her case in chief.
And the defendant to sustain the issues upon its behalf thereupon introduced the following evidence.

And the said Earl R. McKee, being first duly sworn to testify to the truth, the whole truth, and nothing but the [fol. 338] truth, relating to said cause, testifies as follows, to-wit:

Direct examination.

By Mr. Harry McMullen:

Q. You may state your name?
A. Earl R. McKee.
Q. What is your business or profession?
A. Assistant Division Engineer on the Baltimore and Ohio Railroad.
Q. That is the road, that is part that runs from North Vernon to Louisville?
A. Yes.
Q. Do you know the station called Commiskey?
A. Yes.
Q. Have you been down there recently?
A. Yes.
Q. Did you take measurements and levels of the surrounding depot and tracks and things there?
A. Yes.
Q. What is that paper you laid on the railing there?
A. That is a plan of the station, platform and cross section taken just south of the station of the tracks, platform and ground.
Q. Measurements taken by you?
A. Yes.
Q. And the plan or plat there drawn by you?
A. Yes.
Q. And you may state whether or not that is correct or not, represents the station there as it is now?
A. That represents the conditions there on March 16, 1925.
Q. Day before yesterday?
A. Day before yesterday.
Q. Now you did not know or did you know of the conditions there in October of 1917?
A. I did not.
[fol. 329] Q. So this is simply the condition as it was day before yesterday?
A. Yes, as it existed on the 16th.
Q. I wish you would look at the plat or plan which is marked for identification defendant's exhibit No. "2" and tell the court and jury as to whether the top of the map is to the south, north, east or west?

A. Well, here is the arrow, the tracks are running almost north and south.

Q. Then this is on the west side of the plat is the station?

A. On the west side.

Q. On the west side of the map, the west side of the map——

A. Well this insert down here represents a cross section taken at point "A" "A" across from west to east.

Q. So this down here is——

A. This is a cross section of this, right across from the platform and track and ground.

Q. In other words the lower part of this square is a slice that will be taken out of the track, crosswise?

A. Yes.

Q. The upper, heavier, longer lines that represents the tracks as they are now, does it?

A. Yes, location of the tracks and station.

Q. The points marked "A" "A" that is where you took this cross section?

A. Yes.

Q. That is to the east of the station?

A. South.

Q. And also south of the station?

A. Yes, south and east.

Q. The first track from the station east of the station is what one?

A. This is the main track.

[fol. 240] Q. And the next one is?

A. Passing track.

Q. Do you know whether or not that is sometimes called the station track or is it?

A. Well, I do not know, my understanding is this track here is called the station track, I may be wrong on that.

Q. And then this other track here do you know whether or not that is sometimes called a spur track or not?

A. It really couldn't be considered a spur track because it is double end track, it is sometimes referred to as a spur track.

Q. Would you give us, if you can take that and give us the relative elevations or heights, whatever you want to call

them of the rail at the brick platform, the rail on the main track?

A. Well, the top of the rail on the main track is three and seven-eighths inches higher than the platform and the top of the rail on the passing or middle track is one foot one and three quarters inches lower than the top of the rail on the main track.

Q. How about the next track?

A. The east track is an inch and a quarter higher than the passing track or middle track.

Q. Which would make it to do your own computation how much higher or lower whichever it is, that is the rail on this third track farthest east track and the rail on the main track as it is now, in other words what I want to know is this first place, the rail over here on this track as it was on the 16th is it higher or lower than the rail on the main track?

A. Lower.

Q. How much?

A. I have to figure that, twelve inches.

Q. And do you know of your own knowledge or from anything in your office, any data as to whether the present rail, the top of the rail on the main track is higher or lower than it was in 1917?

[fol. 341] A. It is higher from our records.

Q. How much, have you any memorandum, you can refresh your recollection from?

A. Well, there was about a change of approximately five and one half inches maybe at this point last year, the main track, the top of the rail now in the main track is about five and one half inches higher than in 1922.

Q. And before that have you any records whether it was raised or lowered or not?

A. No.

Q. I wish you would take the paper, if necessary, if you haven't done it and measure out the per cent of grade, that would be from say a car floor, the car being approximately four foot from the brick platform there with an eight foot skid, or did I give you enough information to figure that, an eight foot skid to go down or up to a four foot point, would be what per cent of grade?

A. I could give that approximately about forty-nine or fifty per cent.

Q. Can you give it exactly on a per cent, you mean by that, so many feet raise in one hundred feet?

A. Yes.

Q. Now in eight foot, went up four foot that would exactly — fifty per cent?

A. Yes, but that track has been raised some there.

Q. I am asking you to give it as it is now?

A. That would be fifty per cent now.

Q. And figuring off the raise would be what approximately?

A. That would be between forty-five and fifty per cent.

Q. And taking skids or planks say fourteen feet long and running them from this middle track here from a four foot car door, over towards the east, yes, east away from the track as the ground and surroundings are there on the 16th [fol. 342] would be what per cent grade about?

A. How long a plank?

Q. Taking it at fourteen foot and give us a sixteen foot also?

A. Figuring four feet high.

Q. Yes.

A. Sixteen foot would be approximately twenty-five per cent grade and fourteen foot plank would be approximately twenty-eight per cent.

Q. In other words by per cent you mean that to go up twenty-five feet in one hundred feet?

A. I mean the distance up is twenty-five or twenty-eight per cent of the distance out.

Q. And give the approximate levels if you can of the dirt or ground east of the third track at this point?

A. This point here now is four inches, approximately four inches higher than the brick platform.

Q. That is how far out from the east rail of the east track?

A. Well my distances were taken from the edge of the platform, it is forth feet from the platform.

Q. And can you make a little computation and give us from the east track?

A. From the east rail of the side track?

Q. Yes? What you term side track?

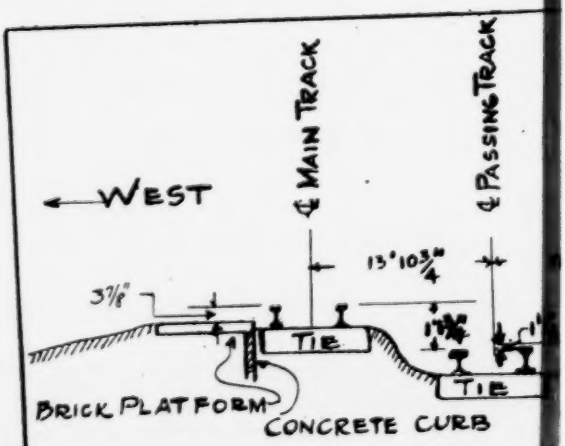
A. It is about seven feet.

COMMISK

S

BRICK

TO LOUISVILLE

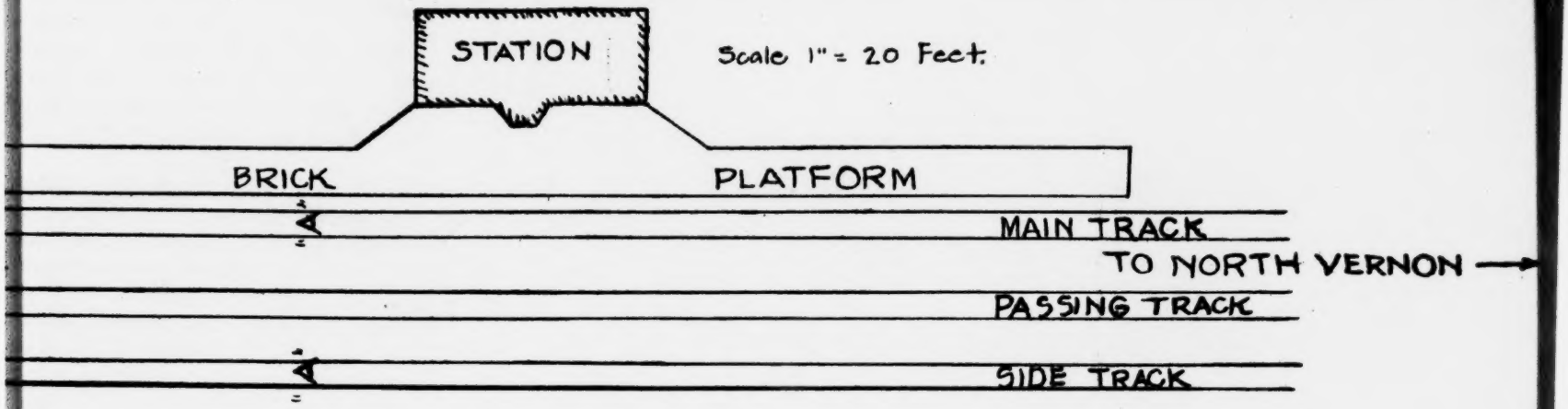


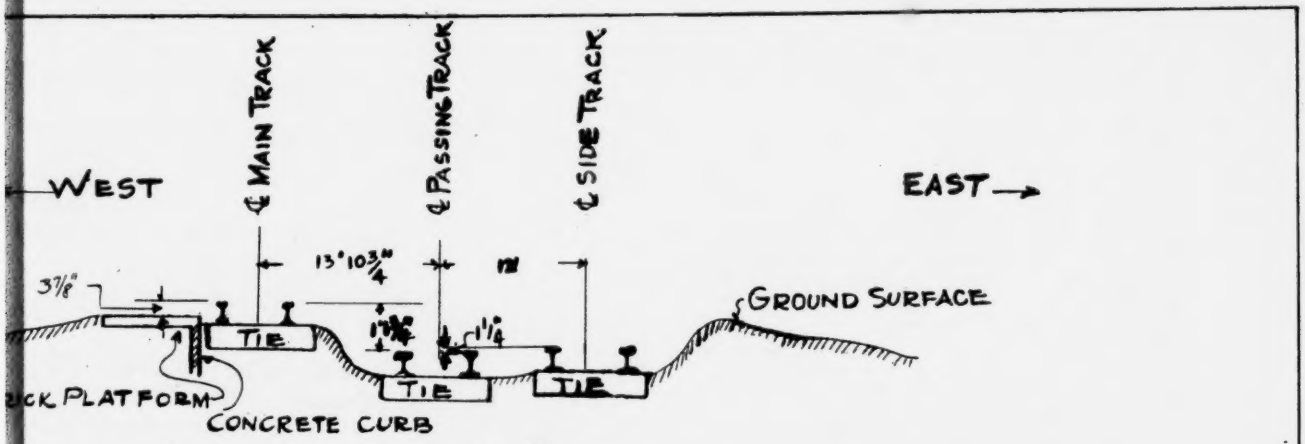
CROSS SECTION AT

AT A POINT 18 F

O

COMMISKEY, INDIANA.





A "A"

CROSS SECTION AT RIGHT ANGLES TO TRACKS AT A POINT 18 FEET SOUTH OF SOUTH END. OF STATION

SCALE HORIZONTAL 1" = 10'.
VERTICAL 1" = 2 1/2'.

Q What are they between tracks, between the brick platform and the first rail or centers whatever you call it?

A. It is approximately twenty-nine inches from the curb to the first *guage* of the first rail of the main track to the center of the track, from the curbing to the center of the track is four feet nine and one-half inches.

Q. And about the same distance between these others?

A. No, that is to the center of the track.

Q. Between rails here now, between tracks, the nearest [fol. 343] rail say *say* from the south rail of that track, the east rail of the main track over to the west rail of the next one and from the east rail to the wide track over to the east rail of the next one?

A. Alright, from the east rail of the main track to the west rail of the passing track is nine feet and two inches. From the east rail of the passing track to the west rail of the sidetrack is seven feet and three inches.

Q. This point here that you took this slice off of, or cross section, you got that from some information did you, where did you locate this place to cut this slice?

A. Why, I was instructed to make a cross section at this point.

Q. By someone—you wasn't there when the car was there?

A. No.

Mr. McMullen: I wish to offer this in evidence.

Defendant's Exhibit No. 1 is now shown to the jury for their inspection.

Mr. McMullen: That is all.

Mr. Montgomery: That is all, no cross-examination.

(Here follows Exhibit No. 1, marked side folio page 344)

[fol. 345] Mr. McMullen: The Defendant offers in evidence what is known as rule 8-B on page 30 official classification number 44 and the certificate thereto attached.

Mr. Montgomery: We will object to that for the reason in this case it has been held to be immaterial. Withdraw the objection.

Mr. McMullen: We ask that the jury be instructed to not consider the speech of Judge Montgomery and that it be withdrawn and they be instructed to pay no attention whatever to that speech he made about this document.

Mr. Montgomery: That may be done.

The Court: That motion will be sustained and the jury not pay any attention to Mr. Montgomery's last speech and argument.

which said rule 8-B on page 30 official classification number 44 and the certificate thereto attached, reads as follows, to-wit:

OFFERED IN EVIDENCE

Section 1. Owners are required to load and unload all freight carried at carload ratings.

Section 2. Owners are required to load and unload heavy or bulky freight carried at L. C. L. Ratings that cannot be handled by the regular employees, or at stations where the carrier's loading or unloading facilities are not sufficient for handling.

Public Service Commission, Indiana

I, Carl H. Mote, Secretary of the Public Service Commission of Indiana, do hereby certify that the schedule hereto attached is a true copy of Official Classification No. 44 R. N. Collyer, Agent, L. R. C.—O. C. No. 44, said schedule having been filed with the Public Service Commission of Indiana on December 14, 1916. The rubber stamp addition appear-[fol. 346] ing on the schedule hereto attached is expressly excluded from this certificate, as said addition does not appear on copy of said L. R. C.—O. C. No. 44 on file.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 23rd day of May, A. D. 1918.

(Signed) Carl H. Mote, Secretary Publice Service Commission of Indiana. (Seal.)

Certificate of the Secretary of the Interstate Commerce Commission that the exhibit marked "I" is a true copy of the official Classification #44 is introduced and read to the jury in evidence.

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedule hereto attached is a true copy of the Official Classification No. 44 R. N. Collyer, Agent, L. C. C.—O. C. No. 44 said schedule having been filed with the said Interstate Commerce Commission on December 12, 1916. The rubber stamp addition appearing on the schedule hereto attached is expressly excluded from this certificate, as said addition does not appear on copy of said L. C. C.—O. C. No. 44 on file.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 9th day of May, A. D. 1918.

(Signed) George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 347] And the said J. A. Colling, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testifies as follows, to-wit:

Direct examination by Mr. Harry R. McMullen:

Q. Give your name?
A. J. A. Colling.
Q. You live where?
A. Commiskey?
Q. What is your business?
A. Track foreman.
Q. Of the B. & O. that runs through Commiskey?
A. Yes.
Q. There is only one road there?
A. Just one road.
Q. How long have you been track foreman?
A. Ten years.
Q. So you were track foreman then in 1917?
A. Yes.
Q. Well is a station platform there in Commiskey?
A. Yes.
Q. And how many tracks?
A. Three east of the depot.
Q. Give the names of these tracks as they are known?

A. Local main track, passing track and station track.

Q. And have you given them in the order from which they go, main track, and passing track and station track?

A. Yes, from the platform over east.

Q. Someone said something about a stub, is there any stub down there?

A. No.

Q. Both connected at both ends?

[fol. 348] A. Yes.

Q. A stub is one that runs out some place and does not go anywhere?

A. Yes, call them spurs.

Q. Was that in your section in October, 1917?

A. Yes.

Q. Your duties are what as section foreman tell the jury?

A. Keep the track in repair.

Q. You heard did you of the injury to Guerney O. Burtch?

A. Yes.

Q. And do you know anything about it, were you there at the time?

A. No, nothing at all, I wasn't there at the time.

Q. Where was you at that time?

A. Between Commiskey and Lovett.

Q. You were working there?

A. Yes.

Q. How long a section have you?

A. Six miles and a half, six mlies.

Q. Now what have you to di w-h the replacing of rails or things of that kind or ties?

A. We have to put new ties in when they get rotten and out of shape.

Q. And rails to be replaced, you working at that also?

A. Yes.

Q. Your duties likewise connected with these two side-tracks?

A. Yes.

Q. What change if any has there been in the height or elevation of the platform at Commiskey since that date?

A. None at all.

Q. What if any in the main track?

A. Been raised something like near seven inches.

Q. From what it was at that time?

A. Yes.

[fol. 349] Q. And how about the next track?

A. The next track was the same now as it was.

Q. Same elevation?

A. Yes.

Q. And how about the next one east?

A. Just the same never been moved.

Q. How about the dirt, between these tracks, the elevation now as compared with it in October——

A. Between the passing track and station track?

Q. Yes?

A. Just the same.

Q. And as between the middle track and the ground out east of the next track east of that how was the ground there in elevation?

A. Almost the same as it was then as near as I know.

Q. Practically the same?

A. Just the same.

Q. I hand you a plat here on that plat is a couple of marks that the engineer called "A" "A's," did you learn that day about where the car had stood at the time Mr. Burtch was injured?

A. Yes.

Q. And you may state whether or not taking that the station and platform being here whether that is practically where the car was at that time?

A. Yes.

Q. Now you notice a cross section, you understand a cross section I suppose?

A. Yes.

Q. Now you notice that there is a ground surface out here what is there out here clear east of the east track?

A. It is a cinder road that was built with cinders, that connects this rise where they use in loading cars.

Q. And about how much higher or lower whichever it [fol. 350] was was the ground east of the east track than the platform in 1917?

A. Almost the same as near as I know, if anything this side is a little bit higher than the platform.

Q. But the two east tracks they are the same elevation, and that ground on the east is the same?

A. Yes.

Q. And from here this has been raised——
A. Seven inches.
Q. That was raised by dirt or what?
A. Raised on gravel ballast.
Q. Now if there is any other change in these surroundings down there except the main track being raised from October 24th, 1917, tell the jury what it was?
A. None at all that I know of.
Q. The saw mill is the same as it was then?
A. The saw mill shed is there, no mill there now, same place.

Mr. McMullen: That is all.

Cross-examination.

By Mr. Harry Meloy:

Q. Mr. Colling, you say the first track to the west is the main track?
A. Yes.
Q. The track nearest the platform?
A. Yes.
Q. That is the main track?
A. Yes.
Q. What do you mean by main track?
A. Main line track is the one trains run on.
Q. Commiskey is a small station?
A. Yes.
Q. Great many trains do not stop there?
A. No.
[fol. 351] Q. And they go right through the town on this main track?
A. Yes.
Q. And the next track east of that is what you call the passing track?
A. Yes.
Q. What do you mean by passing track?
A. Other trains sidetrack on.
Q. To allow trains to go by on the main line?
A. Yes.
Q. Then the track east of that is what you call the station track?

A. Yes.
Q. What is that track used for?
A. For unloading carload lots.
Q. How long is that track approximately?
A. Four hundred and fifty feet.
Q. Now you say east of that they put cinders there and made a sort of elevation or platform for what purpose?
A. Unloading carload stuff.
Q. Unloading carload stuff or heavy machinery?
A. Unloading carload lots.
Q. Do they ever put cars there for the purpose of unloading heavy machinery?

Mr. McMullen: We object as that we never asked about any unloading simply about being level, this is no cross examination.

Mr. Haley: Withdraw the question.

Q. Now Mr. Catling you say they put cinders over there?
A. Yes.
Q. That is east of the——
A. Of the station track.
Q. You say that was done for the purpose of facilitating the unloading of cars?
[fol. 302] A. Yes.
Q. And that condition existed there at that time?
A. Yes.
Q. All you know about where this car was standing at the time of this trouble is what you was told, you wasn't there?
A. No.

Mr. Haley: That is all.
Mr. McMullen: That is all.

And the said W. P. Robertson, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to said cause, testifies as follows, to-wit:

Direct examination by Mr. Harry B. McMullen:

Q. Give your name to the court and jury?
A. W. P. Robertson.
Q. You live where?
A. Louisville, Kentucky.
Q. And what is your business?

A. Brakeman on the railroad.

Q. Running between Louisville and North Vernon that runs through Commiskey?

A. Yes.

Q. What was your business in 1917, October?

A. I was brakeman and flagman on the local.

Q. Were you at Brownstown when this case was tried before?

A. No.

Q. Where was you then?

A. France in the Army.

Q. That day at Commiskey, whether you remember October 20th, or not, do you remember at the time when the man was injured by an ensilage cutter falling on him?

[fol. 352] A. Yes.

Q. You were in what capacity on that train?

A. Flagman.

Q. And what was your duties as flagman?

A. Protecting the train where it is liable to be overtaken by other trains.

Q. Loading and unloading freight?

A. And helping get the train over the road.

Q. Who was the conductor?

A. Jackson.

Q. And who was your other brakeman?

A. Bowden.

Q. Then engineer and fireman did not have anything to do with unloading, they wasn't there?

A. No, sir.

Q. Do you recall where the car was they got this ensilage cutter out of, with relation to the caboose?

A. It was next to the caboose, the last I can remember, the car was a way car next to the caboose.

Q. This way car, what do you mean?

A. L. C. L. shipment, package work.

Q. That was unsealed?

A. We sealed them between stations, but we have authority to break the seal and get the stuff out at stations.

Q. This was what they call——

A. Local way car.

Q. What do you mean by L. C. L.?

A. Less than car load shipment, shipments for different points.

Q. And in this car on that day you had other shipments for other points?

A. Yes.

Q. And after you left Commiskey were other shipments [fol. 334] for as far North Vernon on that day in that car?

A. Yes.

Q. And came on with you after the trouble to North Vernon?

A. Yes.

Q. Do you know where Youngstown is?

A. Yes sir.

Q. Do you remember where you got that car?

A. At the Youngstown's yard.

Q. That is in Kentucky?

A. That is the terminal.

Q. And came up that way?

A. Yes.

Q. Did you learn, need not say who told you, did you learn of any of the people that was interested in the cutter, of being at the station before you got there, hear anything about it down the line?

A. Yes sir, at Watson, that operator asked if we had this sausage cutter in our car.

Q. So you learned something of that at Watson, that is how far out of Louisville?

A. About ten miles out of Louisville.

Q. That was early in the morning?

A. Yes, about ten o'clock.

Q. And you came on up and pulled into Commiskey, what track did you pull in on?

A. Passing track?

Q. That is the next track to the main line?

A. Parallel.

Q. Did you see any men there?

A. Yes there was some men at the station.

Q. What is the first you heard, if you did hear anything, of any talks that Jackson and these men or any of the train crew about the cutter?

[fol. 335] A. Well, the exact words that took place I don't remember, but every one that was there knew we had this

heavy piece of machinery in the car with us, other stuff had to be gotten out and we was getting late and crowded and was getting a little lift out of the men and they was interested with the machinery and helped with it and they assisted us.

Q. Did you know Burtch that day or not?

A. I did not know him that day, I did not know his name, no sir.

Q. But you found out he was one of them?

A. Yes.

Q. What did you do by way of unloading this way freight?

Q. Well, we spotted our way cars as soon as we could opposite the platform, and if I remember right the head man had some other work, what we mean setting off and picking up cars, and I was in the way cars helping there, seeing to getting the right freight out the station, and the conductor checks it up.

Q. Any of these men there that was engaged in farming?

A. Yes, I had a couple in the car with me, I think.

Q. Did you learn later whether one of these in the car was Mr. Burtch or not?

A. I suppose Mr. Burtch was in the car with us.

Q. Then after you had got the smaller articles out then what was said or done there as you recall?

A. The machinery was in the east end of the way car, back in the corner, and it took a good deal of rolling and pinching to get it to the door, while we was getting this to the door some was working the other cars, and went in another and got it pretty near to the door, Mr. Burtch got out of the car and I did not know at the time it was Mr. Burtch but there was two left in the car to finish getting it to the door, while they was after skids and scantlings to unload it with.

Q. Do you recall anyone that suggested the skids?

[fol. 356] A. No that was done, we was leaving that to the men outside to get some stuff up there, I do not know who went and got it or anything about it.

Q. Did you see any of the men go after the skids?

A. No.

Q. See them bring them back?

A. No, I know they put skids up to the door, I do not know who done it whether he done it or not.

Q. Well, after these skids was brought there and put upon the side, of the car, why did you have to have skids?

A. Well, if is a bulky piece of machinery or anything heavy you can get it out on skids, but you cannot lift it, couldn't get enough men around to lift it and being an awkward object it is heavy.

Q. Did you have the station skids?

A. Yes.

Q. Why couldn't you use them?

A. I guess the men out there looking after it they decided other scantlings would be better, because for one reason the station skids are narrower than what the braces on this machinery was, and wanted to get the braces opposite on the skids.

Q. What do you call it boarded up or created?

A. Well, there was a heavy piece of timber, about two by four I think maybe for a bottom runn*d*er fastened on about where the wheels were fastened.

Q. And they were too wide for the station skids?

A. Yes.

Q. And how about whether the station skids were long enough or not for that?

A. Well, it made it pretty steep elevation for a heavy object because it is kinda top heavy you know.

Q. The cutter was top heavy?

[fol. 357] A. Yes, as I remember it.

Q. Then the skids were brought, then what did you do by way of starting to get it out?

A. We got boards under the machinery and got skids under neath the end and pinched it on them and got it started out of the car, and the men on the outside was steadying it while we was getting it on the skids.

Q. You was on the inside?

A. Yes I was.

Q. Any one else there with you at that time?

A. The agent was up in there for a while and two of these people from Commisky I think was there but they got out, there was one man left in the car with me until we got it up on the skids.

Q. How did you get it on the skids, lift it up or pry it?

A. We pried it up with boards and rollers.

Q. And then it started down the skids.

A. Yes.

Q. There was something said about the size of the skids, what was that as you recollect it now?

A. The company's skids?

Q. No these skids that was brought by these men.

A. Well, I never paid particular notice but I think they was about maybe two by six or three by six, something like that.

Q. And about how long?

A. Well, they was fourteen feet long anyway I think.

Q. One end of them on the car door and the other end you noticed was where?

A. One end I think stuck just over the station track rail, outside rail of the station track over across it.

Q. The station skids was about how long?

A. They run around about eight feet, I know you cannot take a station skid and unload out of a car door across [fol. 358] another track, and if you put it next to the rail it makes it too steep.

Q. Do you recall whether any of them said anything there either Jackson or the other men there about whether they wanted it on the east, unloaded on the east side or west side, you recall anything like that?

A. We decided to unload it, or some body did, I don't remember who did to unload it across the station track, it would be better than the main track because the passenger train was getting due and did not want to have it on the main track.

Q. Could that cutter that day have been unloaded with the station skids off the main track on to the platform with say ease and safety as the way you attempted to unload it?

A. No, I do not believe we could have done as easy on the platform as we would have done it or tried to.

Q. This was about how high, you talk — it being top heavy?

A. I judge it must have been four feet high I reckon.

Q. And some of the weight on the top was there?

A. Seemed to me the best I remember, heavier at the top than at the bottom.

Q. Suppose that you had attempted to unload that off the main track on to the platform, what would have been the effect of the top heaviness with the station skids?

A. Harder to steady, to hold it down, the heavier the thing is the harder to get it out of the car.

Q. Afterwards the cutter went down these skids, about how far did it go, after it got started on the skids?

A. I got down to help steady it I think maybe four or five feet from the door or six feet before it broke.

Q. And then finally it broke did it?

A. Yes.

Q. After it was broke what did you boys do?

[fol. 359] A. We all made an effort to get out of the way.

Q. You got out of the way?

A. I got out of the way, yes.

Q. Were you on the same side as Mr. Burtch?

A. Yes I was next to him.

Q. You between him and the car?

A. Yes between him and the car, I think he was standing between the two rails and the station track about where his position was.

Q. And the cutter fell on Mr. Burtch?

A. Yes.

Q. Then what did you men do there?

A. We started picking it up and getting it off of him far enough and grabbbed him around the shoulders and picked him up and let the cutter fall back down.

Q. And can you tell about where the end of the cutter was with reference to the east track?

A. It must have fell just about between the trails, I expect, or just about, I mean about that far out.

Q. Between the rails of this track of the station track?

A. I think that it where it lit.

Q. Now did you know anything of any defect in these planks or either one of them?

A. No.

Q. How they appeared to you?

A. Well looked all right from where I was at, I never paid much particular attention to them myself, had it on them before I got out of the car.

Q. Did you examine the planks afterwards?

A. No.

Mr. McMullan: That is all.

[fol. 360] Cross-examination:

Mr. Montgomery: We do not care to cross examine.

The hour of twelve o'clock noon having arrived court adjourned until one o'clock P. M.

The hour of one o'clock P. M. having arrived court met pursuant to adjournment and the further taking of evidence was resumed.

OFFER IN EVIDENCE

Mr. McMullen: We wish to offer in evidence the interrogatories propounded to the plaintiff and the answers thereto.

Which said interrogatories and answers are read by Mr. C. W. McMullen, and are in the words and figures as follows, to-wit:

STATE OF INDIANA,
Jackson County, ss:

In the Jackson Circuit Court, March Term, 1924

LULA A. CARROLL, as Administratrix, etc.

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY

The defendant respectfully moves the court for an order requiring the plaintiff herein to answer the following interrogatories and each of them under oath and make due return of the same into this court, viz:

Interrogtory No. 1. What was the date of the death of plaintiff's decedent, Guerney Burtch?

Answer: February 10th, 1921.

Interrogatory No. 2. Whas was the date of the injury to [fol. 361] said Guerney O. Burtch, which is alleged to have caused his death?

Answer. October 24th, 1917.

Interrogatory No. 3. On what date did the plaintiff file her amended complaint herein?

Answer. March 5th, 1924.

Interrogatory No. 4. Was not the injury to Plaintiff's decedent Guerney O. Burtch, on which plaintiff bases her action herein and which is claimed to have caused his death, the same injury for which said Guerney O. Burtch sued and

recovered judgment in the Circuit Court of Jackson County, Indiana, which judgment was thereafter affirmed by the Supreme Court of Indiana, and afterwards reversed by the Supreme Court of the United States?

Answer. Yes.

Interrogatory No. 5. Was not said decedent Guerney O. Burtch over the age of twenty-one years at the time of the alleged injury?

Answer. Yes.

Interrogatory No. 6. Was not said Guerney O. Burtch, a resident of Jennings County, Indiana, at the time of the alleged injury?

Answer. Yes.

Interrogatory No. 7. Did not the said Guerney Burtch continue to reside in said Jennings County, Indiana from the date of the alleged injury to the date of his death?

Answer. Yes.

Interrogatory No. 8. If you answer interrogatory No. 7. "No," then state where he did reside between the two dates [fol. 362] mentioned?

Answer. Jennings County, Indiana.

Interrogatory No. 9. Was said decedent, Guerney O. Burtch under any legal disability between the date of the alleged injury and the date of his death?

Answer. No.

Interrogatory No. 10. In what county and state was said alleged injury received?

Answer. Jennings County, Indiana.

Interrogatory No. 11. Are you the duly qualified, appointed and acting administratrix of the estate of said Guerney O. Burtch, deceased?

Answer. Yes.

Interrogatory No. 12. What was the date of your appointment?

Answer. February 14th, 1921.

Interrogatory No. 13. By what court were you so appointed?

Answer. Jennings Circuit Court of Jennings County, Indiana.

Interrogatory No. 14. Have you been acting continuously as such administratrix since the date of your appointment?

Answer. Yes.

Interrogatory No. 15. What is the theory of the first paragraph of your amended complaint?

Answer. No answer.

Interrogatory No. 16. What is the theory of the second paragraph of your amended complaint?

Answer. No answer.

Interrogatory No. 17. What is the theory of the third paragraph of your amended complaint.

Answer. No answer.

Interrogatory No. 18. Were you the former wife of your decedent?

[fol. 363] Answer. Yes.

Interrogatory No. 19. Who procured the two green planks mentioned in your complaint?

Answer. I, personally, don't know.

Interrogatory No. 20. Who brought the two green planks mentioned in your amended complaint to the car with which to unload the ensilage cutter?

Answer. I, personally, don't know.

Interrogatory No. 21. In what way were the two green planks weak, defective and insufficient?

Answer. I, personally, don't know.

Interrogatory No. 22. Did said ensilage cutter come from the city of Louisville, State of Kentucky to the station of Commiskey in the State of Indiana in said car and train?

Answer. I have no personal knowledge.

Interrogatory No. *we*. Did said ensilage cutter come from the City of Louisville in the State of Kentucky to the Station of Commiskey in the State of Indiana in said car?

Answer. I have no personal knowledge.

Interrogatory No. 24. From where were said two green planks procured?

Answer. I have no personal knowledge.

Interrogatory No. 25. What were the dimensions of said two green planks?

Answer. I have no personal knowledge.

Interrogatory No. 26. Of what kind of wood were said two green planks?

Answer. I have no personal knowledge.

Interrogatory No. 27. Were said two green planks sawed planks?

Answer. I have no personal knowledge.

[fols. 364-369] Signed at the bottom of the answer:

Lula A. Carroll.

Subscribed and sworn to before me this 11 day of April, 1924. Oliver P. Shook, Notary Public. My Commission expires No. 20, 192-. (Blank.) (Notarial Seal.)

Mr. McMullen: We also offer in evidence the original complaint in the action of Guerney O. Burtch versus the Baltimore & Ohio Southwestern with the file marks and notations thereon.

which said original complaint is read by Mr. McMullen and is in the words and figures following, to-wit:

Complaint omitted, printed side page 5, ante.

[fols. 370-373] Mr. McMullen: We also offer in evidence motion to strike out parts of the amended complaint which was filed in the Jackson Circuit Court with the file marks and notations thereon, which said motion reads as follows, to-wit:

Motion to strike omitted, printed side page 60, ante.

[fol. 374] Mr. McMullen: We also offer in evidence the motion to make the amended complaint more specific which was filed in the Jackson Circuit Court with the notations [fol. 375] and file marks thereon, which said motion reads as follows, to-wit:

Motion to make more specific omitted, printed side page 64, ante.

[fol. 376] Mr. McMullen: We also offer in evidence the motion to reject parts of the complaint as sham which was filed in the Jackson Circuit Court with the notations thereon.

which said motion was read by Mr. McMullen, and is in the words and figures following, to-wit:

Motion to reject omitted, printed side page 78, ante.

[fol. 377] Mr. McMullen: We also offer in evidence the demurrer to the first, and second paragraphs of plaintiff's complaint in the case of Guerney O. Burtch, versus the B. & O. Southwestern Railroad Company, which was filed [fols. 378 & 379] in the Jackson Circuit Court, together with the notations thereon.

which said demurrer was read by Mr. McMullen, and is in the words and figures following, to-wit:

Demurrer omitted, printed side page 13 ante.

[fol. 380] Mr. McMullen: We also offer in evidence motion to separate causes of actions in the case of Lula A. Carroll, administratrix, etc., versus the Baltimore and Ohio Southwestern Railroad Company, which was filed in the Jackson Circuit Court, together with notations thereon.

which said motion was read by Mr. Cassius W. McMullen, and is in the words and figures following, to-wit:

Motion to separate omitted, printed side page 58 ante.

[fols. 381-384] Mr. McMullen: We also desire to introduce in evidence the demurrer to the first, second and third paragraph of plaintiff's amended complaint in the case number 7716 in the Jackson Circuit Court, under title of Lula A. Carroll, Administratrix etc., versus the Baltimore and Ohio Southwestern Railroad Company, together with the notations and file marks thereon.

which said demurrer was read by Mr. C. W. McMullen, and reads as follows, to-wit:

Demurrer omitted, printed side page 68 ante.

[fol. 385] And the said E. R. Bowden being first duly sworn to testify to the truth the whole truth and nothing but the truth relating to said cause testifies as follows to-wit:

Direct examination by Mr. Harry McMullen:

Q. You may state your name to the court and jury.
A. E. R. Bowden.

Q. You are in the employ of the defendant Railroad Company?

A. Yes sir.

Q. How long have you been in the employ of the defendant?

A. Eight years and eight months.

Q. Are you married?

A. Yes.

Q. Got a family?

A. Yes.

Q. Of seven?

A. Yes.

Q. How long have you been gone from home?

A. Last night.

Q. You were on the train I think that arrived at Commiskey the day when Mr. Burtch was injured.

A. Yes.

Q. Where did that train start from that morning?

A. Youngstown, Kentucky.

Q. Is that really a suburb of Louisville?

A. Yes.

Q. Who else composed the crew that day?

A. Ed Jackson, conductor and me and Robertson, flagman.

[fol. 386] Q. You knew or heard of an ensilage cutter being connected with the accident did you?

A. Yes.

Q. Did you notice the ensilage cutter before the train left Louisville at any time?

A. No.

Q. Was the train loaded when you came down to go on duty?

A. Sure it was in this car that we had out of Youngstown, Kentucky.

Q. The car in which this ensilage cutter was loaded in your train out of Youngstown was it?

A. Yes.

Q. And you stayed with that train continuously until it had gotten to Commiskey?

A. Yes.

Q. Until the ensilage cutter was taken off the train?

A. Yes.

Q. You know from that that the ensilage cutter was in that train before it left Kentucky, do you?

A. Yes.

Q. What was your duties as fireman?

A. Well, to do switching and assisting in unloading freight, getting in and out of sidings and so forth.

Q. Coming down to Cummiskey do you recall the train taking a side track there?

A. Yes.

Q. What track was it on?

A. On the passing track.

Q. What was the first thing you had to do with the unloading with the ensilage cutter if anything?

A. I don't remember of having much to do with it until they had it started out of the car.

Q. Until it was started out?

A. Yes.

[fol. 207] Q. Then what did you do?

A. I was helping steadying it down these skids.

Q. Now were you there when the skids, or planks, you mean——

A. Yes, sir.

Q. When those planks were brought over, were you there?

A. Yes, just about, I was there when they brought them yes.

Q. Did you know the men who were bringing them?

A. Well I did not know them at the time, one of them was Mr. Burtch and one Mr. Arbuckle, so I understood afterwards.

Q. Had you assisted in any way in unloading the cutter before the planks arrived?

A. No.

Q. You were doing the switching?

A. I was doing the switching.

Q. Then did you notice how the planks were put up to the car door?

A. One end was put in the car door and the other out on the ground extending over the station track.

Q. And how far away were you when they were doing that?

A. I was right there when they was putting them up.

Q. Did you have hold of the planks?

A. No sir.

Q. Do you recall whether Dr. Dietrich did or not?
A. Yes. Dr. Dietrich brought one and Dr. Schmidt
Q. Did Dr. Dietrich help in putting it in the car door?
A. Yes.
Q. Then what was the first thing you did, you say you helped steady it?
A. After they started the envelope cutter down I helped steady it down the plank.
Q. Are you faced the car door on which side of the door were you on the left or right?
A. I was on the right side.
[fol. 288] ... And do you recall now either from what happened afterwards or what you saw at the time where Dr. Dietrich was?
A. Dr. Dietrich he was on the left side I believe.
Q. It doesn't make any difference, I thought perhaps you remembered, which plank that broke?
A. It was the left plank, I was the plank Dr. Dietrich was next to, the one that broke?
Q. Do you recall what stood next to Dr. Dietrich?
A. Yes.
Q. What?
A. Dr. Schlentzer and myself was next to him for one.
Q. You was on the same side as Dr. Dietrich?
A. Yes.
Q. Did you stand next to the car or Dr. Schlentzer or who?
A. I don't remember.
Q. Can you give us some idea about how long a time elapsed between the time when the envelope cutter started down the plank and you started to steady it and when it broke?
A. Almost five or six minutes.
Q. And during the time I was going down did you do anything enough to help steady it?
A. No.
Q. Were you there at any time when there was some conversation about getting some planks?
A. No.
Q. And did you observe the plank after it was broken?
A. I just looked at it after it was broken and saw it had a knot at the broken place, did not give it any close examination.

Q. And before the accident happened had you noticed the plank or both of the planks?

A. Paid but little attention to them.

Q. I wish you would give us a little better idea how Mr. [fol. 200] Burch was standing with reference to the plank?

A. Well, he was helping to steady this sausage cutter down this plank.

Q. And the plank came about how high up on his body?

A. I don't remember that.

Q. Could you tell us whether he stood about half way down the plank or a third ways?

A. He wasn't over, much over one-third from the end of the plank.

Q. How close was he to the place where the plank broke?

A. He was near the place where it broke.

Q. And from your examination of the plank afterwards, could you see what was the matter?

A. Nothing more than I say there was a defective place, a knot through the plank.

Q. It broke right at the knotty or defective place?

A. Yes.

Q. Had you moved any from the time the sausage cutter started out of the car when you reached up to steady it until it broke?

A. Yes.

Q. How far?

A. We was moving it down the plank.

Q. Was the sausage cutter moved down the plank before the plank broke?

A. I imagine six feet.

Q. Give us your best idea how long the planks were?

A. About fourteen feet.

Q. So in your best judgment the machine had reached some where near the middle of the plank?

A. No, I said about six feet, yes, some thing like that.

Q. After the plank broke what was done?

A. We got the machine off Mr. Burch and got him out.

Q. Then was he taken to the depot?

[fol. 201] A. He was taken to the depot, yes.

Q. And that train and crew came to North Vernon?

A. Yes.

Mr. McMullen: That is all.

Cross-examination.

By Mr. Harry Meloy:

Q. You say you were the brakeman?
A. Yes.
Q. And in coming into Commiskey you headed into the switch at the south end of Commiskey?
A. Yes.
Q. You call that the east I believe?
A. We call it the west end.
Q. According to the compass it is the south.
A. Yes.
Q. You pulled in on the side track?
A. Yes.
Q. And pulled up so this way car was close to the depot?
A. Yes.
Q. And it was coupled to the caboose?
A. Yes.
Q. The train stop there?
A. Yes.
Q. And this car continued to be part of the train while the train was there?
A. Yes.

Mr. Meloy: That is all.
Mr. McMullen: That is all.

And the said E. A. Jackson being first duly sworn to testify to the truth the whole truth and nothing but the truth relating to said cause testifies as follows, to-wit:

[fol. 331] Direct examination.

By Harry R. McMullen:

Q. Give you name to the court and jury?
A. E. A. Jackson.
Q. You live where?
A. Louisville, Kentucky.
Q. How long have you lived there?
A. Since 1912.
Q. You formerly lived in North Vernon?
A. Seymour, Indiana.
Q. Your business is what?

A. Railroad conductor.

Q. How long have you been in the employ of the company you are now employed with?

A. Over twenty-five years.

Q. You worked up from a brakeman?

A. Yes.

Q. You are now a passenger conductor?

A. Yes.

Q. On October 24th, 1917, what was your business then?

A. Conductor on a local freight train between Youngstown, Kentucky to North Vernon, Indiana.

Q. Do you recall the circumstance of a man being injured there on that day, Mr. Burtch?

A. I remember the injury, yes, the accident.

Q. Now you left Youngstown, Kentucky on that train about what time that morning?

A. Eight twenty in the morning I think it was.

Q. Was there on that train that morning as you left Youngstown that morning a car that contained this ensilage cutter?

A. Yes it was in the car.

Q. And you came on up across the river and up toward Commiskey?

A. Yes.

[fol. 392] Q. Where were you when you first learned that any one was waiting, need not tell what was said, where was you when you first learned anyone was waiting or inquired about that?

A. When we was pulling away from Watson, the agent came out there and——

Q. Need not tell.

Q. I was on the rear end of the caboose.

Q. On this train?

A. Pulling away from there.

Q. About how far is that out of Youngstown?

A. Ten miles.

Q. What is Youngstown, that a station, yards or what?

A. That is the west end of Louisville.

Q. Then did you learn anything more about the ensilage cutter or get any further inquiries about it until you got to Commiskey or you recall?

A. Well, I knowed we had the ensilage cutter for Commiskey.

Q. Any one from Commiskey inquire about it?

A. When we was pulling by the station at Watson the agent came out and wanted to know if I had an ensilage cutter for Commiskey and I said yes.

Q. And then you got at Commiskey about what time?

A. I do not know, around the neighborhood of four o'clock.

Q. You was some behind time?

A. Yes, we was late.

Q. When you first got in there did you go up the main track or go into the siding?

A. Went into the siding.

Q. You had orders there about meeting some other train?

A. We did not have orders, we had to keep clear of passenger trains going south.

Q. Who was the first ones that you saw or talked to about [fol. 393] the ensilage cutter there that day, or do you recall?

A. Well, I really can't recall they was all around there the men were waiting for it.

Q. And what was the first thing said to you if you recall or what you said to any of the men?

A. Well, I do not know what the first words was.

Q. The substance of it?

A. I think I offered to suggest if it would be all right to unload it there, more convenient place, they could set it up there.

Q. On the east side?

A. We call it the south side, it is the east side according to the land.

Q. Do you know whether Mr. Burtch was one of these men that was talking about that or not or was he around there?

A. He was in the crowd of men, one of the crowd.

Q. What was said if anything by you about assistance, tell the jury the substance of that, I do not expect you to give the exact language?

A. I don't remember whether I said anything about assistance to them, but naturally they all came up there to assist.

Q. And did assist?

A. And did.

Q. Now what if you recall how these planks got there, how they happened to get there?

A. The best of my knowledge I think Mr. Burtch got one and a gentlemen by the name of Arbuckle got the other.

Q. Were you acquainted with them at the time or find out afterwards that was the name?

A. I know Mr. Arbuckle by sight but was not acquainted with Mr. Burtch.

Q. At whose suggestion was it the planks were got if you recall?

A. Well, I don't remember who made these suggestions, [fol. 394] seemed like there was some suggestion about getting the planks, I do not know whether it was myself or one of these gnetlemen.

Q. Any how it was agreed amongst you to get the planks?

A. Yes.

Q. Did you give any directions as to where they was to be gotten?

A. No.

Q. Did you know where they were to be gotten?

A. Yes, I knew there was a saw mill close by, and knew there was a lot around there.

Q. Did you go over to the saw mill?

A. No I did not.

Q. And when these two men got the planks what did they do with them?

A. Put them up in the car to make a skid out of them.

Q. Before you started to unload the cutter what do you know if any thing else being unloaded from the car from the other side of the car?

A. Well there was some groceries and other articles too numerous to mention taken out on that side and taken over and liad on the platform.

Q. Do you remember whether or not any barrles or stuff taken out that day?

A. No I do not.

Q. Is it part of your duties to help also to unload?

A. Yes.

Q. Where were you when the planks were brought over to the car?

A. I was on the east side there by the door.

Q. In the car or around the station track?

A. No, I wasn't in the car, at the station track.

Q. You saw the planks there?

A. Yes.

Q. Would you tell the court and jury about what kind of [fol. 395] planks were——

A. Well, I should judge they was about two and one half or three inches thick and between five and one half and six inches wide, and to my judgment about twelve or fourteen feet long.

Q. And you looked at the plank, how did they appear to you whether they were good planks or what kind of planks they were?

A. Well, apparently looked like they was able to hold the ensilage cutter.

Q. Was there stat*t*ion skids there that day?

A. Yes.

Q. What do you say as to whether or not these skids were long enough to have unloaded that ensilage cutter with safety without these other planks?

A. Well, really I do not think they was safe enough, because they was too short, I judge only about eight feet long and make it too steep for the ensilage cutter to come out on, to send it down on.

Q. Did you notice at that time as to the width of the station skids?

A. I do not know what the width of them is.

Q. Any how they got the planks and then they started the thing down the skids, down these planks, *eht* ensilage cutter?

A. Yes.

Q. Where were you when they was putting it on the planks, out of the car?

A. I was right there.

Q. Was you on the ground or up in the car?

A. I was on the ground.

Q. Then there has been something said about you pu*e*eting your foot on these planks, tell the jury whether or not you did it and why, if you did?

A. I did put my feet on the end of the plank to toe them so they would not be knocked loose from the top when they [fol. 396] put the ensilage cutter on.

Q. To brace them on there?

A. Naturally do that all the time.

Q. What do you mean by toeing, putting your toe against it?

A. To support it.

Q. To keep it from slipping down?

A. Yes, from the top when you put the ensilage cutter against it.

Q. And up to that time did the plank still seem suitable and sufficient to you?

A. Apparently, yes.

Q. Then the cutter went out on the skids?

A. Yes.

Q. And what did you do then?

A. Why, I was there assisting after they got in on the planks, kinda steadying it and took it down slow because it was heavy and bulky.

Q. And how about weighty at the top, whether topheavy?

A. It was what I call top heavy or bulky, had to handle it very carefully.

Q. Finally one of the planks broke?

A. Yes.

Q. Will you tell the jury about how far in your judgment the br-ake was the break in the plank I mean from end to end, whether in the middle or certain distance from either end of the plank?

A. I do not think it was right in the middle, after we got it down about two feet or somewheres it began to crack, I said get out of the way, I said that is breaking and seen it was going to fall, the plank gave way and all got out of the way.

Q. The cutter was about two foot out of the car door you think?

A. I judge about two feet probably a little more I couldn't say for sure.

Q. If you noticed there at that time where it broke or no- [fol. 397] tice the piece afterwards where it was broken about what part of the plank was it that broke, whether in the middle or one side or how?

A. I think it was in the middle of the plank or near the middle of the plank.

Q. Then the thing fell and caught Mr. Burtch?

A. Yes.

Q. Was you on the same side of the plank or opposite?
A. On the same side, back of him.
Q. And what was done then about getting the cutter off him?
A. We all got together and sheer strength took it off of him.
Q. And somebody pulled him out?
A. Yes.
Q. Do you remember who pulled him out?
A. The brakeman got a cushion out of the caboose and put him on it.
Q. Do you remember who first got hold of him and pulled him out?
A. No, I do not.
Q. Now if there was any defects or weaknesses in that plank or either of them before the weight of the cutter came on it tell the jury what weakness was if there was any before the cutter came on it, or the plank that you could see?
A. I did not notice any.
Q. And afterwards what did you find after the plank broke, what did you find?
A. I found a knot hole or knot where it caused it to break.

Mr. McMullen: That is all.

Cross-examination.

By Mr. O. H. Montgomery:

A. I think that is all Ed.

Mr. McMullen: We rest your Honor.

And this is all the evidence introduced by the defendant in chief to sustain the issues tendered on its behalf. [fol. 398-406] And the plaintiff to sustain the issues tendered on its behalf introduced the following evidence in rebuttal.

Mr. Montgomery: We want to introduce the deposition of Oliver P. Gothlin.

Which said deposition was read by Mr. H. Meloy and was in the words and figures following, to-wit:

Deposition of O. P. Gothlin omitted, printed side page 93 ante.

[fol. 407] Reporter's certificate to foregoing omitted in printing.

[fol. 408] IN CIRCUIT COURT OF JENNINGS COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

Be it remembered, that on the 22nd day of August, 1925, and within the time allowed by the Court for filing its bill of exceptions in the case wherein Lula A. Carroll as administratrix of the estate of Guerney O. Burtch, deceased, is plaintiff, and the Baltimore and Ohio Southwestern Railroad Company, is defendant, being num-er — in the Circuit Court of Jennings County, in the State of Indiana, the said the Baltimore and Ohio Southwestern Railroad Company, presented to the undersigned John A. Carney, Judge of said the Jennings Circuit Court in vacation the attached and foregoing original bill of exceptions containing all the evidence in said case and ask that the same be signed, sealed and allowed filed as a paper and part of the proceedings in this cause.

And the said Judge of said court having seen and examined the same finds that the said bill of exceptions is full, true and complete and contains all of the evidence given in said cause and all of the offers of proof, and all evidence made by the parties upon the trial thereof and all of the rulings of the Court thereon, and all of the objections made by the parties to evidence offered upon the trial thereof and all of the rulings of the Court thereon and all of the exceptions of the parties to said rulings.

And said bill of exceptions is now this 22nd day of [fol. 409] August 1925, allowed, signed, sealed and filed, and made a member and a paper and a part of the proceedings in said cause.

And it is ordered that the Clerk of the Jennings Circuit Court, upon the request of the said The Baltimore and Ohio Southwestern Railroad Company, defendant, certify to

this the said original bill of exceptions on appeal to the Supreme Court of the state of Indiana, instead of a transcript thereof.

In witness whereof the said the Honorable John A. Carney, Judge of the Jennings Circuit Court of Jennings County, in the State of Indiana, has hereunto set his hand and seal as such Judge of said Court in Chambers this the 22 day of August, 1925.

John R. Carney, Judge of the Jennings Circuit Court, of Jennings County, in the State of Indiana.

[fol. 410] In Circuit Court of Jennings County

[Title omitted]

Clerk's Certificate

I, Edward J. Welker, clerk of the Jennings Circuit Court, of Jennings County, in the State of Indiana, do hereby certify that on the 22nd day of August, 1925, the Honorable John R. Carney, sole Judge of the Jennings Circuit Court, of Jennings County, in the State of Indiana, caused to be filed in my office as such Clerk of said Court the attached above and foregoing bill of exceptions containing the evidence given in the case wherein Lula A. Carroll, as administratrix of the estate of Guerney O. Burtch, deceased, is plaintiff and the Baltimore and Ohio Southwestern Railroad Company, is defendant, being cause number 7286 of the said Jennings Circuit Court, after the said bill of exceptions had been allowed, signed and sealed by the said the Hon. John R. Carney, Judge of the said the Jennings Circuit Court.

And said bill of exceptions is now on the said 22nd day of August, 1925, filed with me and in my office as such Clerk as a paper and a part of the proceedings in said cause.

In witness whereof, I have hereunto set my hand as such Clerk and the seal of said Court this the 22nd day of August, 1925.

Edward J. Welker, Clerk of the Jennings Circuit Court of Jennings County, in the State of Indiana. (Seal.)

[fol. 411] In Circuit Court of Jennings County

[Title omitted]

Præcipe for Transcript of Record—Filed July 22, 1925

To the Clerk of the Jennings Circuit Court:

The defendant in the above entitled cause, The Baltimore and Ohio Southwestern Railroad Company, requests you to prepare and properly certify for use on appeal to the Supreme Court of the State of Indiana, a transcript of all the papers, entries, præcipe instructions given, requested and refused, files orders and proceedings filed and had in the above entitled cause and of all orders, rulings and exceptions made and taken in said cause and of the judgment therein rendered, excepting only from said transcript defendant's general bill of exceptions and defendant's request you to embrace in the transcript, defendant's original bill of exceptions, containing all of the evidence given in said cause, together with the Court's rulings and all ob-
[fol. 412] jections and objections relating thereto, instead of a copy of said general bill of exceptions.

Verbarg, McMullen & McMullen, Attorneys for Defendant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 413] In Supreme Court of Indiana

The Baltimore and Ohio Southwestern Railroad Company, Appellant,

vs.

Lula A. Carroll, as Administratrix of the Estate of Guerney O. Burtch, Deceased, Appellee

Assignment of Errors

The appellant says there is manifest error in the judgment and proceedings, prejudicial to appellant, in this cause in this:

1. The court erred in overruling the motion of appellant to remand the papers and transcript to the clerk of the Jackson Circuit Court for proper certification.

2. The Court below erred in overruling the motion of appellant, defendant below, for a new trial of said cause.

3. The court below erred in overruling the motion of appellant for judgment in its favor on the answers of the jury to interrogatories propounded to it notwithstanding the general verdict.

4. The court below erred in overruling motion of appellant to separate causes of action as stated in each of the paragraphs of plaintiff's amended complaint.

5. The court below erred in overruling motion of appellant to strike out parts of each paragraph of plaintiff's complaint.

6. The court below erred in overruling appellant's motion to make each paragraph of plaintiff's amended complaint more specific.

7. The court below erred in overruling appellant's de-[fol. 414] murrer to each paragraph of plaintiffs', appellees' amended complaint.

8. The court below erred in overruling the motion of appellant to strike out and reject each paragraph of plaintiffs', appellees', amended complaint as sham.

McMullen and McMullen, Attorneys for Appellant.

[fol. 415] In Supreme Court of Indiana

Minute Entries

[Titles omitted]

Sept. 28, 1925

Comes now the parties by their counsel, and this cause is submitted to the court for judgment and decree as pro-

vided by an Act of the General Assembly of the State of Indiana, approved March 6th, 1917, and the rules of said Supreme Court adopted in relation thereto.

Nov. 25, 1922

Comes now the parties by their counsel, and the Court being advised in the premises grants appellant's petition for time to and including January 27th, 1923.

[Vol. 638] Jan. 27, 1923

Comes now the appellants by their counsel and files appellant's briefs (2), which briefs are in the words and figures following, to-wit:- (Ill. 1.)

Feb. 15, 1923

Comes now the appellee by her counsel and files appellee's briefs (2), which briefs are in the words and figures following, to-wit:- (Ill. 1.)

[Vol. 637] Feb. 15, 1923

Comes now the appellee by her counsel and files a petition to transfer the above entitled cause to the Appellate Court, which petition is in the words and figures following, to-wit:- (Ill. 1.)

Feb. 20, 1923

Comes now the parties by their counsel, and the Court being advised in the premises sustains appellee's petition to transfer the above entitled cause to the Appellate Court, and said cause is transferred to the Appellate Court under Sec. 1365.

[Vol. 4]

[illegible]

[illegible]

[illegible

May 7, 1926

Comes now the appellants by their counsel, and file appellant's reply briefs, (8), which briefs are in the words and figures following, to-wit: (H. I.)

[fol. 421] Jan. 13, 1927

Comes now the parties by their counsel and the Court being advised in the premises, four Judges not Concurring, the above entitled cause is transferred to the Supreme Court under No. 25346.

In Supreme Court of Indiana

The Baltimore and Ohio Southwestern Railroad Company

vs.

Lula A. Carroll, Admrx.

No. 25346

Minute Entries—Feb. 15, 1928

Comes now the appellee by her counsel, and files additional authorities (8), which authorities are in the words and figures following, to-wit: (H. I.)

[fol. 422] [Titles omitted]

Feb. 23, 1928

Come now the appellants by their counsel, and file additional authorities (8), which authorities are in the words and figures following: to-wit: (H. I.)

In Supreme Court of Indiana

The Baltimore and Ohio Southwestern Railroad Company

vs.

Lula A. Carroll, Admrx.

No. 25346

Judgment—Oct. 2, 1928

Come now the parties by their counsel and the Court being advised in the premises, affirms the judgment of the

Court below with the following opinion pronounced by Martin, J., which said opinion is in the words and figures following:

[fol. 423] IN SUPREME COURT OF INDIANA

OPINION

This action was brought on February 20, 1918 in the Jackson Circuit Court by Guerney O. Burtsch against the railroad company to recover damages for personal injuries suffered by him on October 24, 1917, as a result of the company's negligence, while he was engaged in assisting to unload a heavy ensilage cutter from a freight train at Commiskey, Indiana.

From a verdict and judgment, rendered May 28, 1918, in Burtch's favor in the sum of $8,000.00, the railroad company appealed to this court where the judgment was affirmed March 14, 1922. Baltimore etc. R. Co. v. Burtch, (1922), 192 Ind. 199, 134 N. E. 858.

Burtch, who was injured because of the breaking of a defective skid, was caught and crushed by the falling ensilage cutter. Three ribs were broken, and paralysis resulted from an injury at the lower part of the dorsal vertebræ. He had no control of his legs, bladder, bowels and other organs and parts of his body below the waist; was able to sleep only by the aid of hypodermic injections, could do no labor and required the attention of a nurse. He died from these injuries February 10, 1921 and appellee, his widow, was appointed administratrix of his estate and was substituted as a party in the proceedings that have followed. (Appellee's name was changed to Carroll by her marriage about three years after Burtch's death.)

On application of the railroad company, the Supreme Court of the United States, by certiorari to this court, reversed the judgment, January 7, 1924, B. & O. S. W. R. v. Burtch (1924), 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433, holding (1) that uncontradicted evidence established the character of the shipment of the ensilage cutter as interstate, (2) that such evidence prevailed over the special findings and the general verdict, (3) that the unloading of the interstate shipment by the employees of the carrier was so closely related to interstate transportation as to be practically a part of it and (4) that therefore the case

[fol. 424] should be governed by the Federal Employers' Liability Act, (Act April 22, 1908, 35 Stat. at L. 65, ch. 149), and the Act of 1910 amendatory thereto, (see infra) and not by the State law, and in that view it should have been submitted to the jury. The court also held (5) that the authority of the conductor of a freight train to employ a bystander to assist in unloading heavy freight may be derived from custom and the emergency or exigency of the occasion, and (6) that the liability of an interstate carrier for an accident suffered by a part owner of a heavy article of freight while assisting, as the carrier's employee, in unloading it from the car, was not affected by the existence of a rule filed by the carrier with the Interstate Commerce Commission requiring owners of such articles, under stated conditions to unload them, since the rule did not affect the relations between the carrier and its employees, but must be observed only to prevent discrimination among shippers, and failure to enforce it was no part of the cause, but was merely an attendant circumstance of the accident.

Pursuant to the mandate of the Supreme Court of the United States, this court reversed the judgment of the Jackson Circuit Court and directed that a new trial be granted. B. & O. S. W. R. v. Burtch (1924) 194 Ind. 701, 142 N. E. 865. This was done and on March 5, 1924 the appellee administratrix filed her amended complaint in three paragraphs each praying for damages for the injuries sustained by Burtch in his lifetime and by the appellee his administratrix, for herself and for their two children age three and five years, by his death.

The first paragraph, which did not go to the jury, charges a cause of action under the Indiana Employers' Liability Act, Acts 1911, ch. 88, § 9432 et seq. Burns' 1926, the second is an action at common law and the third is based upon the Federal Employers' Liability Act, supra. The appel- [fol. 425] lant filed an answer in four paragraphs—the first a general denial, the second alleging that the cause of action did not accrue within two years next before the commencement of this ac*i*on,* the third alleging that so much of the

*Two years is the limit of time within which such an action may be brought (1) generally under the Indiana law 302 Burns' 1926 (see § 307 Burns' 1926 as to extension of time in case of death), (2) under the Federal Employers' Liability Act, §6, Act April 22, 1908, ch. 149, 25 U. S. Stat. at L. 66 as amended by Act April 5, 1910, ch. 143, 36 U. S. Stat. at L. 291, and (3) under the Indiana Employers' Liability Act § 9439 Burns' 1926.

cause of action as is based on the death did not accrue within two years, and the fourth alleging that decedent was a part owner of the ensilage cutter and was required to unload the same by a rule of the appellant approved by the Indiana Public Service Commission and the Interstate Commerce Commission. The issues were closed in the Jackson Circuit Court by replies in general denial to the second, third and fourth paragraphs of answer, and the cause was then sent on a change of venue to the Jennings Circuit Court where a trial by jury resulted in a verdict and Judgment for appellee on March 18, 1925 in the sum of $15,000.00.

The appellant's motion for a new trial was filed April 11, 1925 and overruled June 1, 1925. An appeal to this court was perfected on August 28, 1925, the cause was transferred to the Appellate Court on February 26, 1926 for want of jurisdiction under § 1, ch. 201, Acts 1925, § 1356 Burns' 1926 and retransferred to this court on January 13, 1927 and under § 15, ch. 247 Acts 1901, § 1351 Burns' 1926, that court having been unable to arrive at a result concurred in by four of its judges.

Appellant has assigned a number of alleged errors. Some of these have been waived in the preparation of its brief and some present questions that were settled adversely to appellant on the former appeal. Only two questions of law arise which require discussion here: (1) is the action for (a) the injury or (b) the death of Burtch barred by the statute of limitations because the amended complaint thereon was not filed within two years? (2) are the facts proven such as show as a matter of law an assumption of risk by appellee's decedent which bars a recovery?

Section 293 Burns' 1926 provides that in case one who [fol. 426] has obtained a judgment for personal injuries, from which there has been an appeal and reversal dies before a new trial is had, that his claim shall survive and may be prosecuted on behalf of his estate.

By an Act April 5, 1910, 36 U. S. Stat. at L. 291, ch. 143, (which amended Act April 22, 1908 by adding thereto section 9) it is provided that any right of action given by the act to a person suffering injury shall survive to his personal representative for the benefit of the widow, children, etc., "but in such cases there shall only be one recovery for the same injury." The effect of this amendment is to per-

mit and require all damages, both to decedent by reason of the injury and to the beneficiaries by reason of the death to be recovered in one action.

17 C. J. 1187;
Northern Pac. R. Co. v. Merkl (1912), 198 Fed. 1, 117 C. C. A. 237;
Missouri, etc., R. Co. v. Wulf (1913), 226 U. S. 570, 33 S. Ct. 135, 57 L. ed. 255, Ann. Cas., 1914B 134 and note;
Kansas City, etc., R. Co. v. Leslie (1915), 238 U. S. 599, 35 S. Ct. 844, 59 L. ed. 1478;
Great Northern R. Co. v. Capital Trust Co. (1916), 242 U. S. 144, 37 S. Ct. 41, 61 L. Ed. 208, L. R. A., 1917E 1050;
St. Louis, etc., R. Co. v. Craft (1915), 237 U. S. 648, 35 S. Ct. 704, 59 L. Ed. 1160;
Moffett v. Baltimore, etc., R. Co. (1914), 220 Fed. 39, 135 C. C. A. 607, 18 R. C. L. 864;
Notes 47 L. R. A. (N. S.) 82;
Ann. Cas. 1914C 182.

Where additional or amended paragraphs of complaint are filed after the lapse of the statutory limitation which [fol. 427] are founded upon the same transaction as that sued on in the original complaint and which merely expand or amplify what has already been alleged, they relate back to the commencement of the action at which time the statute of limitations was arrested and they are not affected by the intervening lapse of time. Chicago, etc., R. Co. v. Dinius (1914), 180 Ind. 596, 103 N. E. 652; Cleveland, etc., R. Co. v. Bergschicker (1904), 162 Ind. 108, 69 N. E. 1000; Chicago, etc., R. Co. v. Bills (1888), 118 Ind. 211, 20 N. E. 775, and an amendment to a complaint alleging that the parties were engaged in interstate commerce but alleging no different state of facts does not introduce a new or different cause of action, and hence may be made although the limitation period had elapsed.

Missouri, etc., R. Co. v. Wulf, supra;
Curtice v. Chicago, etc., R. Co. (1916), 162 Wis. 421, 156 N. W. 484, L. R. A. 1916D 316, writ of certiorari denied 247 U. S. 510;
New York, etc., R. Co. v. Kinney (1922), 260 U. S. 340, 43 S. Ct. 122, 67 L. Ed. 294;

Smith v. Atlantic, etc., R. Co. (1913), 210 F. 761;
Wilson v. Denver, etc., R. Co. (1920), 68 Col. 105, 187 P. 1027; 18 R. C. L. 860;
Note Ann. Cas. 1914C, 1029.

It follows that the action for the injury and for the death of Guerney O. Burtch sued on in appellee's amended complaint is barred by neither the Federal nor State statutes of limitation.

In some of the cases holding that an amendment to the complaint alleging that the cause of action arose in interstate commerce might be made after the period of statutory limitation has expired, it appears that the court considered that such facts had been imperfectly alleged in the original complaint, Seaboard, etc., R. Co. v. Renn (1916), 241 U. S. 290, 36 S. Ct. 567, 60 L. Ed. 1006, and from those cases it might be argued that an amendment alleging the interstate nature of the action could not be made in the entire absence [fol. 428] in the original complaint of facts showing the same. But from the later cases cited above, it is clear that such an amendment is permitted even though there is nothing in the original complaint to show whether the action arose from an interstate or an intrastate transaction.

Moreover in the case at bar the United States Supreme Court has held that Burtch's injuries were sustained in interstate commerce; has determined that "in that view it should have been submitted to the jury" and remanded the cause for a new trial for that purpose. That court decided the former appeal more than two years after the cause of action for Burtch's injuries arose and was advised as to the length of time provided by statute as the limitation within which an action for the same could be brought, as well as to the date of the injury and death, and we cannot presume that the court would have remanded the cause for a new trial if at that time it was impossible under the law to amend the complaint so that it could be submitted to the jury as directed by the court.

Burtch and several other bystanders in pursuance of a proven custom of the railroad company, were employed by its train conductor to assist him and three brakemen in unloading the ensilage cutter, which article of freight weighed about a ton. The train was standing on a side track. West of this side track was the main track and west

of the main track was the regular depot brick platform. East of the side track was a loading or station track. The regular barrel skids the company had there for unloading freight were not long enough to reach from the train over the main track to the depot platform or over the loading track to the ground. If the train had been placed on the main track they would have reached the depot platform or if the train had been placed on the loading track they would have reached the ground.

[fol. 429] The conductor, Jackson, proceeded to unload the ensilage cutter over the loading track to the ground. At his direction Burtch and another (Arbuckle) procured from a nearby lumber yard pieces of lumber or planks to be used as skids upon which to slide the ensilage cutter from the freight car across the loading track to the ground.

The jury, in answer to interrogatories propounded to them at appellant's request, among other facts found (13)** that the injury was caused by the breaking of a plank on which the ensilage cutter was being unloaded from the freight car, (14, 41) that the planks were brought from a saw-mill about 60 feet away by Burtch and Arbuckle, (16, 17) that the planks were fresh sawed poplar 2 or 3 inches thick, 6 inches wide and 12 or 14 feet long, (18, 19) that they were not selected by Burtch and Arbuckle but were selected by Ed. Jackson, the conductor, (20, 21, 44) that neither of the planks showed defects apparent at any time to Burtch or Arbuckle, (23, 24, 25, 45, 46) that the defect which caused the plank to break was a knot, that it could not have been discovered by the use of ordinary care by Burtch and Arbuckle at the saw-mill or on the way to the car, but was apparent if the plank had been properly examined, (25, 38) that the defect could not have been discovered by the naked eye and that Burtch was prevented from discovering the defect as it was not visible to him while performing his work, (64) that Burtch did not have as good an opportunity to see, examine and know of the timbers as the defendant or any of its employees (Jackson), (65) that the defect was such as could have been discovered by the use of ordinary care by Jackson, as overseer, but not such as could have been discovered by the use of ordinary care by the workmen, Burtch and Arbuckle, (67), that

**These figures refer to numbered Instructions.

Burtch was a farmer but wasn't a judge of timber or a mover of heavy machinery.

There was evidence that Jackson's examination of the [fol. 430] planks to ascertain if they were sound or otherwise strong enough to support the machine consisted in his looking at them and that he "kind of tested them and worked his foot up and down to see," and he said they would hold it up, and there was other evidence which reasonably justified the conclusions stated by the jury in the answers to the interrogatories.

The Federal Employers Liability Act, supra, relating to the liability of common carriers by railroad to their employees suffering injuries while engaged in interstate commerce abrogates the common law rule under which the negligence of a fellow servant is a bar to recovery, Second Employers Liability Cases (Mondou v. N. Y. etc. R. Co.) (1912), 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (NS) 44, its effect being to make the negligence of a fellow servant the negligence of the employer, Pa. R. Co. v. Goughnour (1913) 208 Fed. 961, 126 C. C. A. 39; Skaggs v. Ills. C. R. Co. (1914) 124 Minn. 503, 145 N. W. 381, 125 Minn. 532, 147 N. W. 1135, affirmed 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528.

It eliminates contributory negligence as a bar to recovery by providing as a rule of comparative negligence that damages shall be diminished by the jury in proportion to the amount of negligence proximately attributable to the injured employee, Cain v. S. R. Co. (1911) 199 F. 211, 213; Seaboard etc. R. Co. v. Tilghman (1915), 237 U. S. 499, 35 S. Ct. 653, 59 L. Ed. 1069 and eliminates entirely the defense of contributory negligence in cases where the violation by the carrier of any (Federal) statute enacted for the safety of employees proximately contributed to the injury, §§ 63, 64 Richey, Federal Employers Liability (2nd ed).

It does not, however, change the rule that an employee shall be held to have assumed the risk of his employment (except where there is a violation by the carrier of a (Federal) statute enacted for the safety of employees that proximately contributed to the injury or death of such em-
[fol. 431] ployee), Seaboard etc. R. Co. v. Horton (1914) 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C 1, A. Cas. 1915B 475, Seaboard Ry. Co. v. Horton (1916), 239 U. S. 595, 36 S. Ct. 180, 60 L. Ed. 458.

The risk of his employment that the employee assumes is the ordinary, usual, obvious and unavoidable dangers and perils naturally incident thereto, so far as these are not attributable to the employers negligence, Gila Valley etc. R. Co. v. Hall (1914) 232 U. S. 94, 34 S. Ct. 229, 58 L. Ed. 521; § 72 Richey, supra. The defense of assumption of risk, like that of contributory negligence, is based upon the knowledge and appreciation of the servant of the danger causing the accident, 18 R. C. L. 683, and knowledge is presumed as regards the usual and ordinary risks.

The risk resulting from the negligence of the employer will also be assumed by the employee when with knowledge thereof and appreciation of the danger resulting therefrom he continues his employment without objection and is thereafter injured by reason of such negligence, Seaboard Airline v. Horton, supra; § 73 Richey supra, and knowledge of the negligent conduct and resulting danger will be presumed when such conduct and danger are so patent, open obvious or apparent that an ordinary careful person under the circumstances would observe and appreciate them. Chi. etc. R. Co. v. Ward (1919), 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430; Mich. etc. R. Co. v. Shaffer (1915) 220 F. 809. But if the employee had no notice or knowledge of the peril, or by the exercise of reasonable and ordinary care he could not have known of it he cannot be held to have assumed the risk.

In saving the defense of assumption of risk, the act places a co-employees negligence in the same relation as the employers own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk, Chesapeake etc. R. Co. v. De Atley (1916), 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, and when the injury arises from a single [fol. 432] act of negligence creating a sudden emergency without warning to the servant or opportunity to judge of the resulting danger the defense of assumed risk is inapplicable. Chi. etc. R. Co. v. Ward (1919), supra; Texarkana etc. R. Co. v. Casey (1914), — Tex. Civ. App. —, 172 S. W. 729.

The employee does not assume the risk of a defect in an appliance unless he knew of the defect and knew that it endangered his safety, and of which defect the employer knew or for which he was responsible, Choctaw etc. R. Co. v.

McDade (1903) 191 U. S. 64, 24 S. Ct. 24, 48 L. Ed. 96; Gila Valley etc. R. Co. v. Hall (1914), supra; Yazoo etc. R. Co. v. Wright (1914) 235 U. S. 376; 35 S. Ct. 130, 59 L. Ed. 277; Central Vermont R. Co. v. White (1915) 238 U. S. 507, 35 S. Ct. 865, 59 L. ed. 1433 and an employee is not required to search for defects or critically inspect the appliances furnished to him, Chesapeake etc. R. Co. v. DeAtley, supra.

In Seaboard Air Line R. Co. v. Horton, supra, (233 U. S.), the court after pointing out the distinction between contributory negligence and assumption of risk said:

"But risks of another sort, and naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinary prudent person under the circumstances would have observed and appreciated them."

And in Chesapeake etc. R. Co. v. DeAtley, supra, the court citing Gila Valley etc. R. Co. v. Hall, supra, and Seaboard Air Line v. Horton, supra, said:

"According to our decisions the settled rule is not that it is the duty of the employee to exercise care to discover [fol. 433] extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary unless the want of care and the danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them."

In the case at bar, as in Smith v. Railroad Co. (1920), 108 Kansas 151, 194, P. 318, where a railroad bridge carpenter was injured by the fall of a scaffold due to the breaking of a needle beam containing a knot, it cannot be said as a matter of law either that the danger was so obvious that the plaintiff must have known of it, or that it was so

remote that the defendant could not be charged with knowledge of it; both such questions were for the jury.

Assumption of risk is a substantive issue, but the procedure is the established procedure prevailing in the courts of this state. By the well settled procedure of Indiana, whether the deceased assumed the risk of being injured in view of all the circumstances of the case, is a question for the jury under proper instructions. Pa. Co. v. Stalker (1918) 67 Ind. App. 329, 119 N. E. 163; Ambre v. Postal Telegraph Cable Co. (1909) 43 Ind. App. 47, 86 N. E. 871; Rogers v. Leyden (1891), 127 Ind. 50, 26 N. E. 210; Annadall v. Union Cement Co. (1905) 165 Ind. 110, 74 N. E. 893; Riley v. Neptune (1914), 181 Ind. 228, 103 N. E. 406, Cleve. etc. R. v. Bellange (1922) 78 Ind. App. 36, 135 N. E. 367.

On conflicting evidence the question of assumed risk is for the jury, Chesapeake etc. R. Co. v. DeAtley, supra; Cent. Vt. R. Co. v. White, supra; Gila Valley R. Co. v. Hall, supra; McGovern v. Phila. etc. R. Co. (1914) 235 U. S. 389, 35 S. Ct. [fol. 434] 127, 59 L. ed. 283; Kanawha etc. R. Co. v. Kerse (1916), 239 U. S. 576, 36 S. Ct. 174, 60 L. ed. 448, and the trial court is bound to submit the case to the jury unless a recovery is impossible upon any view that can possibly be taken of the evidence, § 75 Richey, supra. So questions in any particular case of whether a defect or danger was obvious or whether the employee had knowledge of the peril, or in the exercise of due care would have had knowledge, are for the jury. Chesapeake etc. R. Co. v. DeAtley, supra; Choctaw etc. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244, 7 Ann. Cas. 430, 4 L. R. A. (NS) 837, 18 R. C. L. 685. It is only where the uncontraverted evidence discloses the fact that the danger was apparent to an ordinarily prudent person, and that the services were thereafter rendered without complaint that the defense of assumption of risk is conclusively established that there is no question for the jury, § 75, Richey, supra.

The evidence in the case at bar does not conclusively show, nor does it show at all, that the risk of injury was the ordinary and usual risk and peril incident to decedent's employment. There is evidence to show that the risk was extraordinary, in the sense in which that word has been used in the cases, and arose out of the negligence of the employer's conductor, was unknown to appellant and was not

a risk which he was bound to appreciate, or take notice of. It was therefore, under proper instructions, a question for the jury.

The jury were instructed at length upon the law governing the assumption of risk (the court giving all of the instructions tendered by appellant upon that subject), and they were likewise fully and correctly instructed on the other questions of law discussed above.

No error appearing in the record the judgment is affirmed.

Myers, J., concurs in the conclusion.

[fol. 435] IN SUPREME COURT OF INDIANA

[Titles omitted]

MINUTE ENTRIES

Nov. 22, 1928.

Come now the appellants by their counsel, and file appellants' petition for rehearing (8) in the above entitled cause, which petition is in the words and figures following, to-wit: (H. I.).

Dec. 1, 1928.

Comes now the appellee by her counsel and files appellee's brief (8) on petition for rehearing, of the above entitled cause, which briefs are in the words and figures following, to-wit: (H. I.).

[fol. 436] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER DENYING REHEARING—Mar. 15, 1929

Come now the parties by their counsel, and the Court being advised in the premises, denies appellants' petition, as heretofore filed, for rehearing of the above entitled cause.

[fol. 437] IN SUPREME COURT OF INDIANA

[Title omitted]

PETITION FOR STAY OF PROCEEDINGS—Filed Mar. 20, 1929

To Honorable Clarence R. Martin, Chief Justice of the Supreme Court of Indiana:

Your petitioner, The Baltimore and Ohio Southwestern Railroad Company, appellant in the above entitled cause represents as follows, viz:

That on October 2, 1929 the Supreme Court of Indiana rendered and filed an opinion affirming in all things the judgment of the lower court appealed from. That in due time appellant duly filed its petition for re-hearing and presented its briefs thereon. That on March 15, 1929 said petition for rehearing was by this said Court denied.

Said judgment of said lower Court, affirmed by this Court was for the sum of Fifteen Thousand Dollars. Appeal bond was executed and is still in force in the sum of Eighteen Thousand Dollars with the United States Fidelity and [fol. 438] Guaranty Company, Baltimore, Maryland, surety thereon.

Your petitioner further represents that it desires to prosecute a petition for Writ of Certiorari to the Supreme Court of the United States, and hereby petitions your Honor to enter an order staying all further proceedings in the above entitled cause until a decision of the Supreme Court of the United States is had upon its petition for Writ of Certiorari upon your petitioner filing in said Supreme Court of Indiana such bond as your Honor shall prescribe with good and sufficient surety, conditioned that if your petitioner fails to make application for said writ according to a law or fails to make i-s plea good in the Supreme Court of the United States, it shall pay all damages and costs which the Appellee herein may sustain by reason of said stay, if your Honor deems further bond is necessary. Your said petitioner prays such orders and conditions as your Honor shall deem right and proper.

The Baltimore and Ohio Southwestern Railroad Company, by McMullen and McMullen, William A. Eggers, its attorneys.

IN SUPREME COURT OF INDIANA

[Title omitted]

[fol. 439] ORDER STAYING PROCEEDINGS

The Baltimore and Ohio Southwestern Railroad Company, Appellant in the above entitled cause, having represented to the undersigned Chief Justice of said Court, that it desires to present a petition for Writ of Certiorari in the above entitled cause to the Supreme Court of the United States and having asked the undersigned to grant a stay of proceedings in said cause until a decision is had in said Supreme Court of the United States on said petiton, And, it appearing to the undersigned that the judgment affirmed by this court in the above entitled cause was in the sum of Fifteen Thousand Dollars and that an appeal bond in the usual form was duly given in said cause in the sum of Eighteen Thousand Dollars with the United States Fidelity and Guaranty Company, Baltimore, Maryland as surety thereon, which surety is sufficient and approvable and which amount of said bond is more than sufficient to cover all damages said appellee can suffer by reason of said judgment and said stay of proceedings herein,

It is, therefore ordered that all proceedings in the above entitled cause in said Supreme Court of Indiana shall be stayed until the final decision of the Supreme Court of the United States in said cause on said Writ of Certiorari, or in case of failure to make application for such writ of Certiorari on or before May 13, 1929, provided said Appellant shall within five days from this date, execute and file in the office of the Clerk of this Court its bond in said sum with said United States Fidelity and Guaranty Company, Baltimore, Maryland, surety thereon, which surety company is hereby approved. Dated this March 20th, 1929.

Clarence R. Martin, Chief Justice of the said Supreme Court.

[fols. 440 & 441] Bond on Certiorari for $18,000 approved and filed Mar. 23, 1929, omitted in printing.

[fol. 442] IN SUPREME COURT OF INDIANA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Mar. 23, 1929

To the Clerk of the Supreme Court of Indiana:

The Appellant in the above entitled cause, the Baltimore and Ohio Southwestern Railroad Company, hereby requests you to prepare and properly certify a full and complete transcript of all the papers, entries, præcipe, proceedings, record, judgment had and held in said cause, excepting nothing, the same to be filed in the Supreme Court of the United States, pursuant to petition for writ of certiorari of said appellant to said last named Court in said cause.

William A. Eggers and McMullen & McMullen, Attorneys for Appellant, Baltimore and Ohio Southwestern Railroad Company.

[fol. 443] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted, with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the question whether this suit is barred by the statute of limitations. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9937)

FILE COPY

FILED
MAY 13 1923
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 87

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Counsel for Petitioner.

(34,203)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 894

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, the Baltimore and Ohio Southwestern Railroad Company, respectfully shows as follows:

Statement of Questions Involved.

Review and reversal is sought by this petition of the judgment of the Supreme Court of the State of Indiana

of October 2, 1928 (R. 276)—petition for rehearing denied March 15, 1929 (R. 287)—affirming that of the Circuit Court of Jackson County, Indiana, which awarded damages to an administratrix for the wrongful death of her decedent under the Federal Employers' Liability Act, approved April 22, 1908, 35 Stat. 65 C. 149, U. S. C. Title 45, Ch. 2, as amended April 5, 1910, 36 Stat. 291 C. 143, no complaint or petition seeking recovery for damages because of such wrongful death having been filed until more than three (3) years after the death of said Burtch (R. 34). The complaint claiming such damages was an amended complaint filed by the administratrix in the action originally brought by her decedent in his lifetime, and in which he recovered judgment, which judgment was before this Court and reversed by it in Baltimore and Ohio Southwestern Railroad Co. *vs.* Burtch, 263 U. S. 540 (R. 34). The administratrix had herself made party to the proceedings in this Court (R. 208) and endeavored to have the judgment sustained. The question is whether an administratrix of a decedent, who more than two years after the death of her intestate has had herself made party in a proceeding to reverse a judgment for personal injuries in favor of her decedent, and has endeavored to sustain that judgment, can, after its reversal, file an amended complaint more than three years after his death, and claim therein and recover thereon both damages sustained by the decedent in his lifetime and damages for the next of kin because of the wrongful death, no claim for damages for wrongful death having theretofore been asserted, and no

action therefor filed within the two-year period within which alone the statute permits an action to be brought.

There is also a further question involving assumption of risk by the decedent. The accident was due to a knot in a plank procured by Burtch and another, for use as skids in unloading a shipment, which knot was visible on the edge of the plank, but not on either the top or bottom (R. 155). Charges were given on the request of your petitioner, that if the dangers or risks were so apparent that Burtch in the use of ordinary care ought to observe and know of, and with such means of knowledge continues in his work, he is not entitled to recover; also that if he had equal means with the defendant of observing the defect, he could not recover (Charges 16 and 17, R. 85-86). A conflicting charge, requested by the respondent, was given, that Burtch did not assume the risk unless he knew and appreciated the hazards and dangers to which he was about to be exposed, and with full knowledge thereof voluntarily encountered the same, when a person of ordinary prudence would not have done so (Charge 8½, R. 93).

Historical Statement.

On October 24, 1917, Guerney O. Burtch was injured while helping to unload a shipment from a car on the line of your petitioner at the station at Commiskey, Indiana (R. 210-211).

He filed a complaint in the Circuit Court for Jackson County, Indiana, on February 20, 1918, on account of the injuries he sustained (R. 1).

There was a verdict and a judgment May 28, 1918, for eight thousand dollars ($8,000) (R. 14). Thereafter, and while the case was pending in the Supreme Court of Indiana, Burtch died, to wit, on February 10, 1921 (R. 102). His widow, Lula Burtch, was, on February 14th, 1921, appointed as administratrix (R. 103).

The judgment of the Jackson County Circuit Court was affirmed by the Supreme Court of Indiana March 14, 1922 (R. 33).

A petition for certiorari filed in this Court from that judgment on September 2, 1922 (R. 207), was allowed in this Court, and certiorari and return filed herein January 2, 1923 (R. 208). On her own motion, the administratrix was substituted as respondent in said proceedings February 20th, 1923 (R. 208).

The said judgment of the Supreme Court of Indiana was reversed by this Court January 7th, 1924 (R. 34). The opinion is reported in Baltimore and Ohio Southwestern Railroad Co. *vs.* Burtch, 263 U. S. 540.

Two points were determined by this Court: one that the shipment involved was an interstate shipment, and the other that Burtch was an employee of the railroad company at the time of the accident engaged in interstate commerce, and that, therefore, the case was controlled by the Federal Employers' Liability Act.

The Supreme Court of Indiana thereupon reversed the Circuit Court of Jackson County, Baltimore and Ohio S. W. R. R. Co. *vs.* Burtch, 192 Indiana 199 (R. 34).

Thereafter, to wit, on March 5, 1924, a so-called amended complaint was filed by Lula Carroll as ad-

ministratrix of the estate of Guerney O. Burtch, deceased, against your petitioner in the Circuit Court for Jackson County, Indiana (R. 34), Mrs. Burtch in the meantime having been married and being now Lula Carroll (R. 226). This complaint of March 5, 1924, contained three paragraphs as follows:

(*a*) A paragraph purporting to state a cause of action under the State Employers' Liability Act (R. 34).

(*b*) A paragraph claiming damages to the deceased during his lifetime and to the plaintiff because of injuries sustained by Burtch during his lifetime (R. 38).

(*c*) A paragraph claiming damages to the deceased during his lifetime because of his injuries and to the plaintiff because of the death of Burtch alleged to have resulted from the injuries. This last paragraph alone was under favor of the Federal Employers' Liability Act (R. 41).

There was a verdict and a judgment on the trial of this case March 19, 1925 (R. 102).

This judgment was affirmed by the Supreme Court of Indiana October 2, 1928 (R. 276), the opinion being reported — Indiana, —; 163 Northeastern Reporter 99. A petition for rehearing was duly filed and overruled by the Supreme Court of Indiana March 15, 1929 (R. 287), 163 Northeastern Reporter 99.

This was the final action available to your petitioner in the state court.(*)

(*) Section 730, Burns' 1926 Indiana Statutes, reads:

"When any cause is determined in the Supreme Court, the clerk shall forthwith notify the clerk of the court below that it is deter-

There was a stay ordered conditioned upon application for Writ of Certiorari being made on or before May 13, 1929 (R. 289) and bond furnished (R. 289).

Statement of the Facts.

The essential circumstances are pointed out in the opinion of this court of January 7, 1924, 263 U. S. 540. As a matter of convenience, it may be stated here that the shipment involved originated at Louisville, Ky., and was destined to Commiskey, Indiana (R. 141-142). It consisted of an ensilage cutter that weighed about two thousand (2,000) pounds (R. 217). Although it was ordered through a local dealer at Commiskey from a wholesale house at Indianapolis (R. 199), the plaintiff and other farmers who were the owners of the machine were on hand at the station at Commiskey awaiting the arrival of the machine, and were prepared to receive it (R. 197). The crew of the local freight train handling the shipment found that it was too heavy for them to unload it. They also found that the ordinary pair of skids such as is customarily used in handling a barrel were inadequate (R. 212).

The conductor called upon the bystanders to assist in the unloading of the shipment. He requested them to get a couple of timbers. Burtch and another procured these timbers from an adjoining saw mill (R. 212). They were not the property of the railroad.

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mined, and whether reversed or affirmed, in whole or in part, or dismissed. At any time within sixty days after such determination, either party may file a petition for a rehearing; if not so filed, the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court."

They placed them against the side of the car and one broke from the weight of the shipment (R. 213). After the accident it was found that one of them had a knot in it, where the break occurred, that did not show on the top or bottom of the plank, but did show on the edge (R. 155). When the cutter rested halfway down on the skids the timber with the knot broke, precipitating the machine onto Burtch (R. 213). All concerned had equal means of determining the suitability of these timbers for use as skids. There is no testimony of any examination of them made by anyone, except in the testimony of the decedent Burtch (R. 212-213):

> "Granville Arbuckle and I went after these plank. We got two pieces 10 or 12 feet long and 3½ x 5 inches thick. We took them to car and put one end in the car and the other across the stub switch. Jackson looked at them and kind of tested them and worked his foot up and down to see and said they would hold. Everett Arbuckle wanted or did put one end of a barrel skid under there and wanted some one to take the other end and put it on edge to support the plank but they said no, that they did not need it."

The Statutes Involved.

The basic statute, of course, is that commonly known as Federal Employers' Liability Act, giving a right of action to employees of common carriers by railroad injured, or their personal representatives if killed, while in interstate commerce through the negligence of the railroad. Following the original act of April 22, 1908, U. S. C., Title 45, Ch. 2, Sec. 51, came the

amendment of April 5, 1910, U. S. C., Title 45, Ch. 2, Sec. 59, providing that the action for personal injury should survive to the personal representative of the employee for the benefit of persons there designated, they being the same beneficiaries as those named in the original act in whose behalf a suit for death might be brought. The amendment, however, stipulated, "but in such cases there shall be only one recovery for the same injury."

It was also provided in the original act of 1908 that "no action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued" (U. S. C., Title 45, Ch. 2, Sec. 56).

Bearing these statutes in mind, we think it advisable to refer briefly to some of the important dates in the history of this case.

The accident occurred October 24, 1917, and Burtch, the employee, died February 10, 1921, more than three years after the date of the accident. His widow was appointed administratrix February 14, 1921, and more than two years after her appointment was substituted as respondent in the proceedings in this Court February 20, 1923, on motion made by her counsel (43 Sup. Ct. Rep. 360). This Court reversed the Supreme Court of Indiana on January 7, 1924. The amended complaint, when the administratrix first claimed damages for wrongful death, was filed March 5, 1924, more than three years after the death of Burtch and her appointment as administratrix, and more than six years after the date of the accident.

The Jurisdiction of This Court.

We submit that this is a cause of which this Court may properly take jurisdiction by its writ of certiorari.

(*a*) The errors complained of are not technical, and involve defects that affect the substantial rights of the petitioner under a statute of the United States, which right was decided adversely to your petitioner by the highest court of the State of Indiana (U. S. C., Title 28, sec. 344).

(*b*) Under Section 730, Burns' 1926 Indiana Statutes, quoted above, the railroad after the judgment was affirmed by the Supreme Court had the right to petition for a rehearing. This was done. It was the last available step open in the state court. The petition for rehearing was denied March 15, 1929, and this petition is filed within three months from that date (U. S. C., Title 28, section 350; Chicago, G. W. R. R. Co. *vs.* Basham, 249 U. S. 164, 167) and within the period fixed in the supersedeas bond, May 13, 1929 (R. 439).

(*c*) By the opinion of this Court, when this case was before it on a prior occasion, it was established that the Federal Employers' Liability Act controls (The Baltimore and Ohio Southwestern Railroad Company *vs.* Lula Burtch, administratrix, 263 U. S. 540).

(*d*) Your petitioner seasonably raised in the courts below the Federal questions involved.

1. A motion to separately state and number the several causes of action united in each paragraph of the amended complaint (R. 44), which was overruled (R. 44).

2. Motions were made to strike out all those parts of the amended complaint relating to the death of Burtch, and to damages on account of said death (R. 45 and 59), which were overruled (R. 49).

3. There was a demurrer to the amended complaint, which in several ways raised the question of the limitation period (R. 52; R. 53, sub. 3, paragraph *g* and sub. 4; R. 54, sub. 15; R. 54, sub. 16). This demurrer also in several ways raised the question of assumption of risk (R. 53, sub. 3, paragraph *e-e*, and sub. 5; R. 53-54, sub. 7 and 11; R. 54-55, sub. 18).

4. In the answer, both in the second and third paragraphs, the railroad set up that the death claim was barred by the statute of limitations (R. 56-57) and assumption of risk (R. 57).

5. A motion to strike all reference to the death was overruled (R. 59-60).

6. Instructions Numbers 7 (R. 92), 8 (R. 93), 10 (R. 94), 13 (R. 94), and 14 (R. 95), offered by the plaintiff and given, over objection (R. 96), raise the question of limitations under the Federal law. The effect of these was to permit the jury to consider the evidence under the third paragraph of the complaint as to the damages for death notwithstanding the fact

that the amended complaint was filed more than two years after Burtch had died.

7. Instruction 8½ (R. 93) requested and given by the court at the plaintiff's request, over objection (R. 95), instructed the jury that there could be no assumption of risk unless the decedent had actual knowledge and appreciation of the hazards and dangers to which he was about to be exposed, which was in conflict with charges given at defendant's request, 16 and 17 (R. 85-86), that decedent was chargeable with knowledge if he had equal means with defendant of observing the defect, or if in the use of ordinary care he ought to have observed it.

8. In the motion for a new trial the question of limitations was again pressed (R. 116 and 118).

9. The question of limitation was again raised when objection was made and overruled to the reading of the transcript of the proceedings in the first suit (R. 205).

10. The limitation question was again raised during the examination of the administratrix (R. 228, 229, 231, 232).

(*e*) Moreover, the case involves a question of general importance under the Federal Employers' Liability Act and is one of first impression. At least our researches have not brought to light any decisions that we deem squarely in point.

The Errors Complained of.

The errors of the trial court consisted in the overruling the several motions and demurrer and in giving the special charges above referred to, all of which raise the questions stated at the outset of this petition.

Under the decision of this Court and the findings of the jury resulting in the verdict and judgment now complained of, the only applicable paragraph of the amended complaint was the third, as it alone averred interstate commerce (R. 41). It combined in one paragraph a claim for damages for the injury suffered by the decedent in his lifetime and a claim for damages sustained by the widow and next of kin due to death. These were two separate causes of action. The primary rights of Burtch because of the injury, and of his next of kin, as represented by the administratrix, because of death were different and the violations of those rights created, therefore, two distinct causes of action. The motion to separately state and number should have been granted.

The amended complaint, filed March 5, 1924, showed the date of death February 10, 1921 (R. 37, 40, 43), and consequently showed that the cause of action because of the death was barred by the two years' limitation in the act, so that the motions to strike out the allegations respecting death and damages because of death should have been granted, and the charges permitting recovery of damages because of death should not have been given. Then there is also the error resulting from the instructions as to assumption of risk, to which we have just referred.

These errors of the trial court were affirmed by the State Supreme Court notwithstanding the insistence of the petitioner herein, plaintiff in error therein, to the contrary.

Prayer.

Your petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the State court, and will present its brief for consideration with this petition, discussing at greater length the questions involved.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Indiana, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of proceedings in said Supreme Court in the case entitled The Baltimore and Ohio Southwestern Railroad Company *vs.* Lula Carroll, Administratrix, and numbered in said Supreme Court No. 25346, to the end that this case may be reviewed and determined, as provided in the acts of Congress in such case made and provided, and that the petitioner may have such relief as this Court may deem proper, and that the opinion and judgment of said Supreme Court of the State of Indiana may be reversed by this Honorable Court.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
By MORISON R. WAITE, AND
WILLIAM A. EGGERS,
Its Counsel.

STATE OF OHIO,
County of Hampton, ss:

William A. Eggers, being duly sworn, on his oath says that he is one of the counsel for the Baltimore and Ohio Southwestern Railroad Company, petitioner herein; that the foregoing petition was prepared under his instruction and under his supervision, and that he has carefully read the same and believes the allegations herein are true.

WILLIAM A. EGGERS.

Subscribed and sworn to before me this 11th day of May, A. D. 1929.

[SEAL.] PAUL DEWALD,
Notary Public in and for Hamilton County, State of Ohio.

My commission expires March 27, 1930.

FILE COPY

Office Supreme Court, U.
FILED
MAY 13 1929
CHARLES ELMORE CROPLEY
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 884 87

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BUETCH, DECEASED, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Counsel for Petitioner.

(34,203)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 894

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

Preliminary Statement.

This case arose in the Circuit Court of Jackson County, Indiana. The decedent was injured October 24th, 1917 (R. 210), under circumstances which this Court held made him an employee in interstate com-

merce (B. & O. S. W. R. R. Co. *v.* Burtch, 263 U. S. 540). After judgment for the plaintiff (R. 14) and while the case was pending in the Supreme Court of the state, the plaintiff died (R. 102). Upon reversal by this Court, the administratrix filed an amended complaint March 5th, 1924 (R. 34), asking for damages not only because of the injuries sustained by Burtch during his lifetime, but also for damages to the widow and children because of Burtch's death. One of the questions is whether a recovery can be had on account of the death where the suit is filed more than two years after the death has occurred, and where the employee during his lifetime brought suit and recovered a judgment subsequently reversed by this Court. There is no denial that the case is one under the Federal Employers' Liability Act and that the suit for the death was filed more than two years after the death.

In Atlantic Coast Line Railroad *v.* Burnette, 239 U. S. 199, this Court held that even though not pleaded, if the defendant insists upon the point that an action based on the Employers' Liability Act has been brought after the period of limitation, and that is admitted, the action cannot be maintained. The respondent insists that the circumstances except the present case from the limitation period, and the Indiana State courts sustained the respondent. The Railroad Company insists that the action for the death can not be maintained.

Another question involves assumption of risk as to a defect in a single appliance that was not detected until after the accident and also liability on the part

of the master when ordinary care failed to reveal the defect. The state court held that the Railroad Company had to prove knowledge and an appreciation of the danger before the risk was assumed.

The Amended Complaint.

The so-called amended complaint consisted of three paragraphs, one under the state law (R. 34), one under the common law (R. 38), because of injuries, and the third (R. 41) under the federal law, for damages sustained by the decedent while alive, and for damages sustained by the next of kin because of the death.

Objections by the Petitioner.

Your petitioner in the state court at every seasonable opportunity raised objection to the state court entertaining the cause of action based on the death. This was done by motion to separately state and number (R. 44), by motion to strike (R. 45 and 59), by demurrer (R. 52), by answer (R. 56), and by objecting to instructions tendered on behalf of the plaintiff and given by the court (R. 90-96, see note middle page 102 of Record), and by objections to the introduction of evidence (R. 205, 228, 229, 231, 232). The substance of the rulings by the state courts was that the cause of action based on the death could properly be considered. The jury were told that the plaintiff was entitled to damages not only on account of the injuries but also on account of the death, and that there was no bar to the death claim either by way of limitation or otherwise.

The Supreme Court of the state affirmed the trial court, and held (R. 277) that the addition of the cause of action on account of the death was simply an amplification of the original cause of action on account of the injuries. The Supreme Court also held that this Court sanctioned the addition of the death action because at the time of your reversal and remand you knew that Burtch was dead. The State court likewise held that the employee does not assume the risk of a defect in a simple appliance selected by him where the opportunity of inspection is the same as that of the master and the latter could no more readily than the employee detect the infirmity.

Instructions.

The court, among others, gave Instructions Nos. 10 (R. 94), 13 (R. 94-95), and 14 (R. 95) over the objection of the Railroad Company. For convenience, we quote those instructions in full. They read as follows:

> "No. 10. You are further instructed that if you find from the evidence, that said Guerney O. Burtch prior to his death would have had a right to recovery against defendant for personal injuries sustained by him because of the alleged negligence set forth in the third paragraph of complaint herein, and you further find that his death resulted in whole or in part from such negligence, then the plaintiff herein as administratrix of his estate would be entitled to recover in this action not only such damages as said Burtch might have recovered for his said injuries immediately before he died, but also all

damages sustained by his widow and children because of his death."

"No. 13. If you find that on or about the 24th day of October, 1917, Guerney O. Burtch suffered personal injuries as alleged in the complaint herein, and that within two years thereafter he commenced an action against defendant in the Jackson Circuit Court of Jackson County, Indiana, for damages sustained because of such injuries, and in such action he was later awarded judgment in said court, and that defendant duly appealed from said judgment to the Supreme Court of Indiana, and that while said appeal was pending said Guerney O. Burtch died, and afterwards said judgment was reversed, and said cause remanded to said circuit court, and that on the 5th day of March, 1924, the plaintiff herein as the administratrix of the estate of said Burtch, filed an amended complaint for the damages sustained because of such injuries and because of his death, then you are instructed that the statute requiring an action to be commenced within two years after the cause of action accrues does not apply, and this action is not barred by said statute or by any other statute of limitations."

"No. 14. If you find for the plaintiff, it will then become your duty to determine the amount of damages to be awarded, and in fixing the amount of damages it is proper for you to take into account the age, condition of health, habits with respect to industry and earning capacity of Guerney O. Burtch at the time he received the injuries shown to have been sustained by him and mentioned in the complaint, the nature of

his said injuries, the amount and valuation of time lost, if any, because of said injuries, expenses incurred by him, if any, for medical and surgical aid, medicines, nursing and traveling expenses in attempts to heal and cure for said injuries, and the pain and suffering resulting from such injuries and sustained and suffered by him during his lifetime, so far as shown by the evidence; and if you find for the plaintiff upon the third paragraph of complaint and that his death was due in whole or in part to said injuries, you will also add such further amount as will fairly compensate his widow and children for the damages sustained by them because of his death, which should include such reasonable support and maintenance as he would probably have furnished them, and such care, education, counsel and guidance of his children as he would probably have given them during minority, in the light of the evidence, and fix the damages at such sum as will fairly compensate, so far as money can do, for the damages sustained, not exceeding thirty thousand dollars."

It will be observed that the court told the jury in Instruction No. 10 that if they found for the plaintiff, then the plaintiff would be entitled to recover "not only such damages as said Burtch might have recovered for his said injuries immediately before he died, but also all damages sustained by his widow and children because of his death."

Again, in Instruction No. 13 (R. 95), the court said:

> * * * "you are instructed that the statute requiring an action to be commenced within two years after the cause of action accrues does not

apply, and this action is not barred by said statute or by any other statute of limitations."

It will be further noted that this is not limited to the injuries sustained by the decedent, but the court, in speaking of the damages to be recovered, adds the phrase, "and because of his death."

The error which we think exists was repeated by Instruction No. 14, where the jury were told that if they found for the plaintiff that damages could be returned because of the injuries received and also because of the death.

It also appears from the record that objections on the same grounds were made at various times in the proceedings in connection with the introduction of evidence (R. 205, 228, 229, 231, 232), all of which objections were overruled by the state court.

Your petitioner likewise objected to the giving of Instruction No. 8½ (R. 93), as requested by the plaintiff, which charged the jury that the decedent did not assume the risk unless he knew of the defect and appreciated the hazards and dangers to which he was about to be exposed, thus counteracting instructions given at the request of the Railroad Company (R. 85-86), which in substance charged the jury that the plaintiff assumed the risk where the situation was as open and apparent to the employee as it was to the Railroad Company.

Specifications of Error.

The state court erred in overruling the Railroad Company's motion (R. 44), to separately state and

number, and its motion to strike from the amended petition all reference to the death claim (R. 45 and 59). The same error was repeated when the state court overruled the demurrer (R. 52), setting up the statute of limitations, when it gave the instructions tendered by the plaintiff that the two-year limitation period did not bar the claim on account of the death (R. 90-96; see note middle page 102 of Record), when it instructed the jury that if they found for the plaintiff they must return damages not only because of the injuries but also because of the death, and when it permitted the introduction of evidence relating both to the injuries and to the death (R. 205, 228, 229, 231, 232). The Supreme Court affirmed, thereby approving the rulings of the court below, and thereby committing the same errors as the trial court.

Further, the State Supreme Court erred in sustaining the trial court as to Instruction No. 8½ (R. 93), on the question of assumption of risk, and in failing to charge that where the defect could not be foreseen by the exercise of ordinary care, and the situation was as open and apparent to the plaintiff as it was to the defendant, the decedent assumed the risk, and that there was no liability with the Railroad Company.

These errors, we contend, deprived your petitioner of rights granted it by the Federal Employers' Liability Act.

Points and Authorities.

1. *The limitation period of two years in the Federal Employers' Liability Act is a condition annexed to the right to sue.*

Reading Co. *v.* Koons, 271 U. S. 58.

Atlantic Coast Line R. Co. *v.* Burnette, 239 U. S. 199.

Central Vt. R. Co. *v.* White, 238 U. S. 507.

A. J. Phillips Co. *v.* Grand Trunk Western Ry. Co., 236 U. S. 662.

Gillette *v.* D. L. & W. R. Co., 91 N. J. Law R. 220, 102 Atl. 673 (where it ran against a minor).

Alvarado *v.* Sou. Pac. Co., — Tex. Civ. App. —, 193 S. W. 1108 (where it ran notwithstanding insanity).

Ganthier *v.* A. T. & S. F. R. Co., 176 U. S. 245.

Bement *v.* G. R. & I. Ry. Co., 194 Mich. 64.

Shinn *v.* N. Y. C. & St. L. Ry. Co., 24 Oh. App. 113

(In the last three cases, it ran although fraud was used to mislead the employee.)

2. *State procedure cannot affect substantial rights granted by the Federal Employers' Liability Act.*

N. O. & N. E. R. R. Co. *v.* Harris, 247 U. S. 367.

N. O. & N. E. R. R. Co. *v.* Scarlet, 249 U. S. 528.

Pryor *v.* Williams, 254 U. S. 43.

Norton *v.* Erie R. Co., 167 N. Y. Supp. 177.
Cotton *v.* Wabash R. Co., 198 Iowa, 535; 199 N. W. 1005.

3. *The Federal Employers' Liability Act creates separate causes of action, one because of personal injuries, and the other because of death.*

Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 65, 68.
St. L., I. M. & S. R. Co. *v.* Craft, 237 U. S. 648.
Mellen *v.* Goodyear, 277 U. S. 335.

4. *The cause of action for death of an employee under the Federal Employers' Liability Act accrues at the time of death.*

C. B. & Q. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161.
Reading Co. *v.* Koons, 271 U. S. 58.
Seaboard Air Line R. Co. *v.* Oliver, 261 Fed. 1.

5. *Settlement by an employee for injuries under the Federal Employers' Liability Act bars recovery by the beneficiaries for his death.*

Mellon *v.* Goodyear, 277 U. S. 335.

6. *Under the Federal Employers' Liability Act, failure of an employee to sue for two years after injury bars recovery by the beneficiaries for death.*

Rodgers *v.* Pennsylvania R. Co., 19 Fed. (2) 522.

The rule is the same under a state statute.

Seaboard Air Line Ry. *v.* Allen, 192 Fed. 480 (C. C. A. 2); Certiorari denied, 226 U. S. 612.

7. *If suit begun by employee terminates in judgment for Railroad Company, suit by beneficiaries for death would be barred.*

Southern Pacific R. Co. *v.* United States, 168 U. S. 1.

Norton *v.* Erie R. Co., 167 N. Y. Supp. 177.

Belch *v.* Seaboard Air Line Ry. Co., 176 N. C. 22, 96 S. E. 640.

Cotton *v.* Wabash R. Co., 198 Iowa, 535, 199 N. W. 1005.

Vaught *v.* Virginia & S. W. R. R. Co., 132 Tenn. 679, 179 S. W. 314.

Chicago, R. I. & P. Ry. Co. *v.* Schendel, 270 U. S. 611.

8. *Amendments may be made after limitation period to amplify an existing cause of action under the Federal Employers' Liability Act.*

(*a*) *Substitution of personal representative for individual plaintiff.*

M. K. & T. R. Co. *v.* Wulf, 226 U. S. 570.

(*b*) *Amending to allege interstate commerce.*

N. Y. C. & H. R. R. Co. *v.* Kinney, 260 U. S. 340.

Seaboard Air Line R. Co. *v.* Renn, 241 U. S. 290.

Seaboard Air Line R. Co. *v.* Koennecke, 239 U. S. 352.

B. & O. R. R. Co. *v.* Smith, 246 U. S. 653, affg. 169 Ky. 593.

(c) *Amending to explain terms of the complaint.*

Washington Ry. & E. Co. *v.* Scala, 244 U. S. 630.

U. S. Shipping Board *v.* Greenwald, 16 Fed. (2) 948 (C. C. A. 2.)

9. *No amendment may be made by adding a new cause of action if the new cause is barred by the limitation period.*

Union Pac. R. Co. *v.* Wyler, 158 U. S. 285.

Grand Trunk R. Co. *v.* Wright, 21 Fed. (2) 814 (C. C. A. 6), affirmed, 49 S. C. R. 176, on authority of Union Pac. R. Co. *v.* Wyler, 158 U. S. 285.

Brinkmeier *v.* Missouri Pac. R. Co., 224 U. S. 268.

Salyers *v.* United States, 257 Fed. 255 (C. C. A. 8).

United States *v.* Dalcour, 203 U. S. 408.

N. & G. Taylor Co. *v.* Anderson, 275 U. S. 431.

Sunlight Carbon Co. *v.* St. L. & S. F. R. Co., 15 Fed. (2) 802 (C. C. A. 8).

B. & O. R. R. Co. *v.* Branson, 131 Md. 688, 104 Atl. 356.

Capps *v.* A. C. L. R. Co., — No. Car. —, 111 S. E. 533.

Cotton *v.* Wabash R. Co., 198 Iowa, 535, 199 N. W. 1005.

Norton *v.* Erie R. Co., 167 N. Y. Supp. 177.

Seaboard Air Line R. Co. *v.* Allen, 192 Fed. 480 (C. C. A. 2).

T. H. & I. R Co. *v.* Zehner, 166 Ind. 149.

Lavene *v.* Fredericks, 186 Ind. 333.

10. *Liberal construction of statutes regulating amendments does not permit addition of causes of action barred by limitation.*

N. & G. Taylor Co. *v.* Anderson, 275 U. S. 431.

Sunlight Carbon Co. *v.* St. L. & S. F. R. Co., 15 Fed. (2) 802 (C. C. A. 8).

11. *The errors in the charges to the jury were plain and produced material prejudice.*

L. & N. R. Co. *v.* Chatters, 278 U. S. —, (Decided Apr. 15, 1929) reversing 26 Fed. (2) 403 (C. C. A. 5).

Vicksburg & Meridian R. Co. *v.* O'Brien, 119 U. S. 99.

United States *v.* River Rouge Improvement Co. 269 U. S. 411.

Deal *et al. v.* United States, 274 U. S. 277.

Chesapeake & Ohio R. Co. *v.* Cochran, 22 Fed. (2) 22 (C. C. A. 4).

Y. & M. V. R. Co. *v.* Mullins, 249 U. S. 531.

Fillippon *v.* Albion Slate Co., 250 U. S. 76.

Erie R. Co. *v.* Murphy, 9 Fed. (2) 525 (C. C. A. 2).

12. *The errors are not controlled by Section 269 of the Judicial Code, because they are material and prejudicial.*

Camp *et al. v.* Gress, 250 U. S. 308.

Brock *v.* Northwestern Fuel Co., 130 U. S. 341.

Rumsey *v.* N. Y. Life Ins. Co. *et al.*, 267 Fed. 554; certiorari denied, 254 U. S. 654.

Liberty Warehouse Co. *v.* Grannis, 273 U. S. 70.

13. *Action for wrongful death was barred by limitation of two years from date of death.*

Reading Co. *v.* Koons, 271 U. S. 58.

C. B. & Q. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161.

Louisville, Evansville & St. Louis R. Co. *v.* Clarke, 152 U. S. 230.

Luce *v.* N. Y. C. & St. L. R. Co., 211 N. Y. Supp. 184.

14. *The employee assumes the risk from a defect that is as apparent to him as to the master.*

D. L. & W. R. Co. *v.* Koske, 278 U. S. —, No. 219 decided Feb. 18, 1929.

Jacobs *v.* Southern Ry. Co., 241 U. S. 229.

Pryor *v.* Williams, 254 U. S. 43.

Noftz *v.* B. & O. R. R. Co., 13 Fed. (2) 389 (C. C. A. 6).

Kaemmerling *v.* Athletic Mining & Smelting Co., 2 Fed. (2) 574 (C. C. A. 8).

15. *The master is required to use such care in furnishing appliances as is reasonably necessary to make the appliance suitable.*

Hough *v.* Ry. Co., 100 U. S. 213.

Gardner *v.* Mich. Cent. R. R. Co., 150 U. S. 349.

Y. & M. V. R. Co. *v* Mullins, 249 U. S. 531.

ARGUMENT.

It is conceded that this case arises under the Federal Employers' Liability Act, and that the amended

complaint setting up the claim for death was filed more than two years after the death. The two-year limitation period prescribed in the Federal Act is a condition annexed to the right to sue, nor need authority be cited to sustain the proposition that state procedure cannot affect a substantive right granted by a federal statute. The language of the statute seems plain. It gives the employee a right of action for injury, and a right of action is also given in case of death. Those, of course, were the provisions of the Act as originally drawn, April, 1908. By the amendment of April. 1910, the right of action given the employee for injuries can upon his death be prosecuted by a personal representative for the beneficiaries named.

In Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, this Court found (p. 65) that "the Act declares two distinct and independent liabilities, resting, of course, upon the common foundation of wrongful injury, but based upon altogether different principles." The court pointed out the conflict among the decisions in the states construing various survival statutes, and held that under the federal statute the cause of action for death was "independent of any cause of action which the decedent had," and that "it was one beyond that which the decedent had—one proceeding upon altogether different principles" (p. 68).

In St. L., I. M. & S. R. Co. *v.* Craft, 237 U. S. 648, this Court again considered the matter of the causes of action arising under the federal statute. In referring to the statute, Mr. Justice Van Devanter, delivering the opinion of the Court, said (p. 657):

> "It continues, as before, to provide for two distinct causes of action, one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death * * *."

The learned Justice then refers to the statute providing for the survivorship of the action for injuries and says (p. 658):

> "And when this provision and Section One are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

Continuing, it was pointed out that the statute did not seek to restrict the personal representative to one

cause of action to the exclusion of the other, or to require that a choice be made, but to limit him to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action.

It will be remembered, however, that neither in the Vreeland case, 227 U. S. 59, nor in the Craft case, 237 U. S. 648, nor in Northern Pac. R. Co. *v.* Maerkl, 198 Fed. 1 (C. C. A. 9), cited in the Craft case at the bottom of page 659, was there any question of limitation of action. The court, however, does make it clear in these cases that the statute does create two cases of action which are separate and distinct. Nothing in the statute itself, nor in the language of either of these opinions can be properly construed as meaning that suit must be brought to cover both causes of action, even though in order to do that it is necessary to disregard the two year limitation period. We contend that the obvious intent of the statute and of the decisions is that unless the limitation period is a bar to either or both, then there may be a single suit to include both causes of action. Congress did not express any exceptions to the statute in so far as the limitation period is concerned, and this Court has construed the limitation period to be a condition annexed to the right to bring a suit. It follows, it is submitted, that unless suit is brought within two years after the cause of action accrues, whether there is involved the cause of action for the injuries or the cause of action for the death, or whether both are involved, that the suit must be brought within two years after each

cause of action has accrued, and that it cannot be brought after the expiration of that period. In the present instance, therefore, assuming that she had a right of action for the death, the plaintiff is barred in so far as the death claim is concerned, because brought more than two years after the death occurred.

To be read with the cases holding that the two-year period is a condition of the right to sue, is Reading Co. *v.* Koons, 271 U. S. 58, where this court also held that the cause of action began to run from the time of the death of the employee and not from the appointment of the personal representative. It is submitted, therefore, that in the present case the running of the statute could not be postponed until the filing of the amended complaint. Here, too, the court proceeds on the basis of there being two cases of action created by the federal law.

This court reaffirmed its position on this question in Chicago, B. & W. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161, where in referring to the Koons case it stated, at page 163, that "the cause of action accrues at the death", and further said:

> "When it accrues there is an immediate, final and absolute vesting; * * * Upon Anderson's death an administrator might have been appointed and an action brought immediately."

It therefore follows, we contend, that if the cause of action accrued immediately upon the death, suit could not be delayed, as in this case, for more than two years after.

Further, in commenting on the statute, this Court said, at page 162:

> "For an injury resulting in death, the act gives two distinct causes of action. One is to compensate the injured person for his loss and suffering while he lives. * * * The second cause of action is to compensate persons other than the injured employee for pecuniary loss suffered by them through the employee's death."

The Vreeland, Craft and Koons cases, just referred to, are cited in the more recent case of Mellon, Director General of Railroads, *v.* Goodyear, 277 U. S. 335, where the court held that after settlement by an employee his beneficiaries could not sue under the federal law for death resulting from the injuries, because at the time of the death the employee no longer had a right to bring a suit. There the employee was injured July 31st, 1919. He made a settlement and gave a full release March 16th, 1920. He died May 4th, 1920. Suit was brought because of his death April 19th, 1921, which this Court held was barred.

This Court in the Goodyear case also cited Seaboard Air Line Ry. Co. *v.* Oliver, 261 Fed. 1 (C. C. A. 5), where the employee brought suit and had judgment, which was satisfied. The Circuit Court of Appeals there held that this was a bar to an action by the beneficiaries for the death.

It will be observed from the opinion in the Burtch case (R. 280), 163 N. E. 99, that the state court assumed as proved that which we submit is one of the questions in the case; namely, whether the right to sue

for the death merely expands or amplifies the suit based on the injuries. If the state court is correct, then obviously, it seems to us, there would not be two separate and distinct causes of action.

Moreover, we submit that the State Supreme Court is not sustained by the cases upon which it relies.

There are three kinds of decisions by the Supreme Court of the United States construing amendments to petitions under the Federal Employers' Liability Act.

The first is represented by M. K. & T. R. Co. *v.* Wulf, 226 U. S. 70, where the widow brought suit and before trial was substituted as administratrix. This substitution did not amplify the original cause of action, because the allegations of the petition were in nowise disturbed.

The second class involves amendments to allege interstate commerce at the time of the accident. N. Y. C. & H. R. R. Co. *v.* Kinney, 260 U. S. 340, and Seaboard Air Line R. Co. *v.* Renn, 241 U. S. 290.

The third class is represented by Washington Ry. & Electric Co. *v.* Scala, 244 U. S. 630, where the original petition said that the deceased did "suffer intense pain." An amendment was made to show "conscious pain and suffering." This Court, in speaking of these two phrases, said:

> "The difference between the two, if there is any difference at all, is too elusive for application in the practical administration of justice, and the claim that this amendment added a new cause of action to the declaration is too fanciful for discussion. At most it was a slight elaboration of a probably sufficiently claimed

element of damage, and the allowance of the amendment was well within the authority and the effect of Missouri, Kansas & Texas Ry. Co. *v.* Wulf, 226 U. S. 570; Illinois Surety Co. *v.* Peeler, 240 U. S. 214, and Seaboard Air Line Ry. *v.* Renn, 241 U. S. 290."

We contend that the amendment in the Burtch case does not come within any of these classes. The difference between a suit for injuries and a suit for injuries and death is not a difference "too elusive for application in the practical administration of justice." It is a substantial difference created by Act of Congress. The question is not one of substitution of one plaintiff for another, nor a single new allegation claiming under the federal law. Here the plaintiff sought to combine by amendment in one suit two separate and distinct causes of action, although one of the causes of action is clearly barred by the two-year period of the statute.

On the other hand, it is our contention that the situation comes within Union Pacific R. Co. *v.* Wyler, 158 U. S. 285, where, after action based on the common law, an amendment was attempted under a statute in derogation of the common law. This Court held that the statute of limitations applied to such a new cause of action.

In Grand Trunk Ry. Co. *v.* Wright, 21 Fed. (2) 814, affirmed, 49 S. C. R. 176, the plaintiff sued under the Michigan death statute, and at the trial, more than seven years after the injury, amended and relied altogether on the Federal Employers' Liability Statute. The Court of Appeals thought the amended declara-

tion did not show sufficient facts to support a resort to the federal law, but this Court put its affirmance squarely on the Wyler case.

Brinkmeier *v.* Missouri Pacific R. Co., 224 U. S. 268, involved the Federal Safety Appliance Statute prior to amendment, this Court holding that unless the declaration alleged that the defective car was in interstate commerce, the petition was bad, and the amendment could not be made after the limitation period.

In N. & G. Taylor Co. *v.* Anderson, 275 U. S. 431, an attempt was made to amend by adding a cause of action barred by a state statute of limitations. The suit as originally brought was upon an agreement made by the plaintiff corporation with the defendants, whereas it had been made by a partnership since converted into the plaintiff corporation. It was attempted to amend by setting out the real facts. This court held that the change was not merely one of form, but involved a different "fundamental substance." It is our contention that if under such circumstances an amendment can not be allowed, then all the more was the proposed amendment in our case improper, since the cause of action by statute as well as by decision of this Court was separate and distinct from the one involved in the original petition, and where the limitation period is a condition annexed to the right to sue.

In Sunlight Carbon Co. *v.* St. L., S. F. R. Co., 15 Fed. (2) 802, there was involved a claim for damages by fire occurring in October, 1921. While suit was pending, and before judgment, an amendment was proposed in January, 1925, based upon willful negligence.

Under the Oklahoma statute, such a suit had to be brought within two years. The Court of Appeals held that this amended complaint was a new cause of action barred by statute, and therefore could not be considered, citing Union Pacific R. Co. *v.* Wyler, 158 U. S. 285.

In B. & O. R. Co *v.* Branson, 131 Md. 688, the accident occurred September 6th, 1913. There was a verdict and judgment under the Federal Act, affirmed by the Court of Appeals May 17th, 1916, which was reversed in January, 1917 (B. & O. R. Co. *v.* Branson, 242 U. S. 623). The memorandum opinion cited various cases as to whether employer were in state or interstate commerce. When the case came back to the Court of Appeals of Maryland, the plaintiff below filed a motion to remand to the Circuit Court on an amended petition, under the common law. This was refused because the plaintiff had lost his suit based on the federal statute, and because the amendment stated a new cause of action based on the common law, especially since the accident occurred more than four years prior to the time that the motion to amend was filed.

In Capps *v.* A. C. L. R. Co., — N. Car. —, 111 S. E. 533, the accident occurred Auguist 16th, 1915, with death resulting three days later. Suit was brought May 16th, 1916, under the federal law. The answer denied interstate commerce. An amendment filed June 28th, 1917, set up a cause of action under the state statute. The Railroad Company removed to the federal court. The plaintiff then took a voluntary non-suit as to the case under the state law, the Rail-

road Company claiming that it was barred by a one year state period of limitation. The case thereupon was remanded. On June 25th, 1919, the plaintiff filed a new suit, with two causes of action, one under the state and one under the federal law, permitting the original suit, based on the federal law, to remain. On trial of the first case there was a non-suit, the court taking the position that no interstate commerce had been shown. The Supreme Court affirmed, 101 S. E. 216, and a petition for a certiorari was denied, 252 U. S. 80. The defendant railroad filed a motion to dismiss the second suit which was overruled. The Court of Appeals held an appeal premature (108 S. E. 300). The case was tried in November, 1921. The court held that there had been a previous adjudication of the interstate phase, but sustained judgment for the railroad on the ground that action upon the state law set up a new cause of action that was barred by the one-year limitation period.

In Salyers *v.* United States, 257 Fed. 255 (C. C. A. 8), the plaintiff, having two causes of action, stated but one in his original petition, and later sought to amend by setting up the second after the limitation period. The court refused, citing the Wyler case, although the amount asked for in the original petition was large enough to cover both claims.

In Cotton *v.* Wabash Ry. Co., 198 Iowa 535, 199 N. W. 1005, the plaintiff was injured November 29th, 1917, while in interstate commerce. He brought suit September 29th, 1919. In January, 1921, the suit was dismissed without prejudice. Within six months, on

June 7th, 1921, a new suit was brought under the Federal law. A demurrer was sustained because the petition came too late, being filed more than two years after the date on which the right of action accrued, although a state statute permitted a new suit within six months after the dismissal for any cause except negligence of its prosecution.

In Norton *v.* Erie R. Co., 167 N. Y. Supp. 177, the employee was injured November 25th, 1907, and died a short time after. An administratrix sued in April, 1910, under the New York statutes. Upon the trial she withdrew a juror, and later was allowed to amend, claiming under the Federal statute. This was held error because the amendment came two years after the cause of action accrued, notwithstanding a state statute permitted such an amendment if the suit had been under the state law.

In Seaboard Aid Line R. Co. *v.* Allen, 192 Fed. 480 (C. C. A. 2), certiorari denied, 226 U. S. 612, the action was under the state law. The plaintiff died three years after the accident, without suing. The limitation period for an injury was one year. Within two years after death the present suit was instituted. This would have been within the state statute, provided the plaintiff during his lifetime had not barred the action by his failure to sue. The court held that no action could be maintained because at the time of the plaintiff's death there was no right in the plaintiff to maintain a suit for the injuries.

In Mellon *v.* Goodyear, 277 U. S. 335, this court reviewed several of its own decisions involving the

right of an administrator to sue for death where during the lifetime of the decedent the latter had acted so as to bar such a suit from being brought, the gist of the holding being that there could be no suit for a death unless the employee at the time had a right to sue. Here the decedent had a judgment pending at the time of his death, so that he had already exercised his right to sue.

We have been able to find only one decision which could by any possibility militate against this position, L. & N. R. Co. *v.* Echols, 203 Ala. 627. The employee was injured August 24th, 1912. He brought suit October 7th, 1912, forty-four days after he was injured. The case was tried twice. The plaintiff died in June, 1916. The case was revived in the name of the personal representative. In July, 1918, amendments were allowed which set up the interstate character of the employment, and which also added a count for damages growing out of the death. The court allowed both of these amendments. It based its conclusion upon the decision of this Court in the Craft and Wulf cases, which we have heretofore considered, and also on B. & O. R. R. Co. *v.* Smith, 246 U. S. 653, which affirmed, in a memorandum opinion on the basis of the Wulf and Craft and similar cases, the decision of the Kentucky Court of Appeals (169 Ky. 593). As we have heretofore attempted to point out, in neither the Craft, Wulf nor Maerkl case was any consideration given to the limitation period. Moreover, the character of the amendments allowed did not involve an attempt to state a new cause of action, as here.

The amendment in the Kentucky case of B. & O. R. Co. *v.* Smith involved an increase in the amount of damages asked, and an attempt to allege interstate commerce, but did not change otherwise the nature of the suit. The plaintiff throughout was the injured employee. The element of death intervening was not in the case.

The accident occurred March 29, 1909, and the suit was brought March 19, 1911. The principal contention before the Kentucky court was whether the plaintiff was prevented from amending to show interstate commerce after two years. The question that is involved in our present case was not in the Kentucky case, nor has it appeared in any decision of the Court. The situation in the Burtch case, now before you, may be aptly described in the language of Mr. Justice Butler in N. & G. Taylor *v.* Anderson, 275 U. S. 431 (p. 439): "The change was not merely one of form; the fundamental substance of the claim was different."

There is nothing in the Indiana statutes or decisions contrary to the general rule that a new cause of action can not be set up by way of amendment after limitations.

In T. H. & I. R. Co. *v.* Zehner, 166 Ind. 149, and in Lavene *v.* Fredericks, 186 Ind. 333, although the amendments were allowed, the court states the rule to be that if the amendment states a new cause of action, it will not be permitted, especially where the statute bars the cause of action attempted to be added.

Section 423, Burns' 1926 Indiana Statutes, permitting amendments, distinctly provides that this be lim-

ited to cases where the amendment will not deprive a party of any substantial right. We believe there is nothing more substantial than the right of which we have been deprived, namely, that the cause of action for the death, barred by the Act of Congress, should not have been submitted to the jury.

At this point we respectfully call attention to a paragraph in the opinion of the Supreme Court of Indiana in the Burtch case (R. 281), which, for ready convenience, we quote:

> "Moreover, in the case at bar, the United States Supreme Court has held that Burtch's injuries were sustained in interstate commerce, has determined that 'in that view it should have been submitted to the jury', and remanded the the cause for a new trial for that purpose. That court decided the former appeal more than two years after the cause of action for Burtch's injuries arose and was advised as to the length of time provided by statute as the limitation within which an action for the same could be brought, as well as to the date of the injury and death, and we cannot presume that the court would have remanded the cause for a new trial, if at that time it was impossible under the law to amend the complaint so that it could be submitted to the jury as directed by the court."

We submit that the court made a rash presumption, unwarranted by anything in the federal statutes and by anything in your opinion (263 U. S. 540). There was nothing in that case relative to the claim on account of death, and nothing referring to the period of limitations.

When, after reversing, this Court remanded to the Indiana state courts, it did not, and, we submit, could not, authorize the Indiana courts to entertain a suit for the death. The fact that your reversal came two years after Burtch's death raises no presumption whatever on the point. The Act of Congress is plain and unambiguous, and the decisions of this Court are of one accord, namely, that the two year period is a condition annexed to the right to sue. Certainly that right can not be said to exist by reason of some implication involved in your language, or as a result of an inference which the Supreme Court of Indiana attempts to draw merely because you reversed the suit for the injuries two years after Burtch's death. Judicial legislation has never gone that far.

We also contend that the errors which we claim exist are not technical, and that they affect the substantial rights of the petitioner within the provisions of Section 269 of the Judicial Code, U. S. C. Title 28, Ch. 10, Sec. 391.

There was no dispute concerning the various dates involved; that is to say, the suit for Burtch's death was brought more than two years after he died. Nor is there any dispute as to his having recovered a judgment, and as to his having died while that judment was pending in the Supreme Court of the State of Indiana.

These rulings resulted in an intermingling of the two causes of action when presented to the jury. They were told that if they found for the plaintiff, she was entitled to damages such as Burtch might have re-

covered for his injuries just before he died, and also damages sustained by his widow and children because of his death. It is our contention that these rulings presented to the jury two causes of action as a single cause of action, so that it does not follow that the verdict can be sustained on the theory that it is based solely on the injuries and in no wise on the death.

In Erie R. Co. *v.* Murphy, 9 Fed. (2) 525, (C. C. A. 2), a case under the Federal Employers' Liability Act, the court said:

> "To render error harmless it must be held that it *could* not prejudice the rights of the complaining party."

And in Fillippon *v.* Albion Vein Slate Co., 250 U. S. 76, this Court held:

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury, and they furnish ground for reversal unless it affirmatively appears that they were harmless."

Later, in United States *v.* River Rouge Improvement Company, 269 U. S. 411, this Court, near the close of the opinion, cited the rule as embodied in Section 269 of the Judicial Code, and held that the instruction complained of, affecting as it did the elements of benefits in an appropriation proceeding,

> "* * * could not but mislead the jury in reference to a material element necessary for its consideration in determining the amounts of the awards * * *."

Moreover, in Y. & M. V. R. Co. *v.* Mullins, 249 U. S. 531, under the Federal Employers' Liability Act, an error in instructing the jury that the duty of the railroad was absolute, whereas the duty was merely to use reasonable care, was held to be substantial and prejudicial.

In a recent case, Southern Ry. Co. *v.* Chatters, 287 U. S. —, decided April 15, 1929, reversing 26 Fed. (2) 403 (C. C. A. 5), this Court held that there being no basis for a joint liability against the Southern, it was prejudicial error to charge the jury on the question of joint liability. Although in the present case there is only one defendant, nevertheless there are two causes of action involved. The jury was in effect told to make a finding of damages as to both causes of action, although we contend that the one cause of action, to wit, that growing out of the death, was not before the court. If our contention as to that is sound (and we submit that it is), then it seems to us, in view of the holding of this Court in the Chatters case, the error in the Burtch case is prejudicial to the Railroad Company.

Instruction No. 8½ (R. 93), as to assumption of risk, given by the court at the instance of the plaintiff, was in direct variance and overcame the effect of instructions 16 and 17 given at the request of the defendant (R. 85-86). It directed the jury that Burtch did not assume the risk unless "he knew and appreciated the hazards and dangers to which he was about to be exposed, and from which he was injured, and with full knowledge of such dangers and probable con-

sequences, he voluntarily encountered the same " (R. 93).

There are several instructions on assumption of risk given at the request of the defendant. For example, in No. 12 (R. 84) the court told the jury that if a defect existed which was not known to the defendant, nor which could have been discovered by him by the use of ordinary care, that they should find for the defendant. This was repeated somewhat in No. 13 (R. 84) and in No. 14 (R. 84), where the duty of the defendant was fixed as the exercise of ordinary and reasonable care. In No. 16 (R. 85) the duty of the employee was defined as using reasonable care in examining his surroundings and the simple tools with which he is engaged, and that if there was a hazard equally open to his observation as that of his employer, he assumed the risk. In instruction No. 19 (R. 86), requested by the defendant, the duty of the employer was limited as not requiring a search, or a critical inspection of appliances for defects, but that the employee was charged with the duty of exercising ordinary care in examining tools and appliances with which the employee was ordinarily familiar.

It is submitted that the appliance, an ordinary timber, was not one peculiar for use on the railroad. Burtch and another selected the timbers from a sawmill not under the control of the railroad (R., 212). The testing was a matter as open to the conductor as to the decedent. The only person who observed any knot on the timbers was the railroad agent, who made an examination after the accident, and stated that the

knot was visible along one edge of the timber, but it was not visible either on top or bottom (R. 155). No other witness testified regarding the possibility of any defect in any of the timbers.

As the case is one under the Federal Employers' Liability Act, not involving a statute designed to protect the safety of an employee, the common-law rules as to assumption of risk are in effect. We submit that the court misled the jury when it gave Instruction No. 8½ (R. 93), that they must find that the decedent had actual knowledge of the defect before he assumed the risk, and at the same time gave the instructions (R. 85-86) requested by the plaintiff, that if the defect could not be ascertained by the exercise of reasonable care, and was no more obvious to the defendant than it was to the plaintiff, that the risk was assumed. In fact, under these circumstances, we contend that there was no negligence on the part of the railroad.

In Gardner *v.* Michigan Central R. Co. 150 U. S. 349, on page 359, in referring to Hough *v.* Ry. Co., 100 U. S. 213, this Court said that the master is not held as warranting the absolute safety of an appliance, "but he is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable." More recent decisions of this Court have not modified that principle. The appliance here, we submit, was as simple as the claw-bar involved in Pryor *et al.* against Williams, 254 U. S. 43. In Y. & M. V. R. R. Co. *et al. v.* Mullins, 249 U. S. 531 the court

repeated the ruling that it was not an absolute duty upon the master to furnish a safe place, but merely to exercise reasonable care. In D., L. & W. R. Co. *v.* Koske, decided February 18, 1929, 278 U. S. —, this Court held that the plaintiff assumed the risk of stepping into a drain whose location was as apparent to him as it was to the defendant. In Kaemmerling *v.* Athletic Mining & Smelting Co., 2 Federal (2nd) 574 (C. C. A. 8), the court states various principles covering the obligation of the master to the servant in furnishing appliances and concludes, page 578, first column near bottom:

> "From the foregoing it would appear—and the text is supported by a wilderness of authorities—that the servant does not assume the risk of hidden and unusual defects which in the exercise of ordinary care he could not discover. On the other hand the master is not liable for unforeseen accidents resulting from latent or hidden defects which he in the exercise of a degree of care commensurate with the business and situation would not discover."

In Noftz *v.* B. & O. Ry. Co., 13 Federal (2nd) 389 (C. C. A. 6), which arose under a state liability law, the court near the close of the opinion states:

> "It further appears that the defect in this timber was of such a character and so hidden from view before the removal of the siding, incident to making these repairs, that it could not have been discovered by reasonable and proper care, tests, or inspection."

We submit, therefore, that the court below erred in instructing the jury that the plaintiff would have to know of the defect before he assumed the risk, even though that defect could not have been discovered by the defendant in the exercise of reasonable care under the circumstances.

For these reasons, we respectfully submit that the decision of the Supreme Court of the State of Indiana is erroneous, and that its judgment should be reversed.

Respectfully submitted,

THE BALTIMORE AND OHIO
RAILROAD COMPANY,
By MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 87

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

v.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Opinions Below.

The opinion of the Supreme Court of Indiana (R., 277) has not yet been officially reported, but will be found in 163 N. E. Rep. 99. Previous opinions in the case will be found in 192 Ind. 199 and 263 U. S. 540.

Jurisdiction.

The judgment of the Supreme Court of Indiana was entered October 2, 1928 (R., 276). A petition for rehearing was filed on November 22, 1928, and denied March 15, 1929 (R., 287).

Petition for certiorari was filed May 13, 1929. Jurisdiction to issue the writ is conferred upon this Court by Section 237 (*b*) of the Act of February 13, 1925.

The Statutes Involved.

Section 6 of the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65, 66, as amended by the Act of April 5, 1910, Chapter 143, 36 Stat. 291 (U. S. C., Title 45, Section 56), provides:

> "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Section 2 of the Act of April 5, 1910, *supra,* added to the Federal Employers' Liability Act a new section (U. S. C. Title 45, Sec. 59 which reads:

> "SECTION 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

The Question Presented.

Whether it was error in the trial court to permit the filing of an amended complaint by Carroll, administratrix, at the retrial of an action brought by Burtch, an employee, for injuries sustained in unloading an interstate shipment, such amended complaint setting up as an additional ground of damages the death of Burtch, as the result of such injuries, which occurred while the case was pending in an appellate court on appeal from a judgment in his favor, such amended complaint being filed more than two years after the occurrence of death but promptly after the remanding of the case for a new trial.

Statement.

This action was instituted in the Circuit Court of Jackson County, Indiana, February 20, 1918, by Guerney O. Burtch (since deceased) against the Railroad Company to recover damages for personal injuries suffered by him on October 24, 1917, as the result of the Railroad Company's negligence while he was engaged in assisting to unload a heavy ensilage cutter from a freight train at Commiskey, Indiana (R., 1).

On May 28, 1918, a verdict for $8,000 was rendered in favor of Burtch (R., 14), and judgment entered in accordance therewith on October 23, 1918 (R., 29).

The Railroad Company appealed to the Supreme Court of Indiana (R., 30), which, on March 14, 1922, affirmed the judgment (R., 33). *Baltimore, etc., R. Co.* v. *Burtch* (1922), 192 Ind. 199.

On February 10, 1921, while the case was pending on appeal in the Supreme Court of Indiana, the complainant Burtch died as the result of his injuries (R., 102).

On February 14, 1921, his widow, Lula Burtch (now Lula Carroll) was appointed administratrix (R., 103).

The Railroad Company petitioned for and obtained a writ of certiorari from this Court, and Lula Burtch was substituted for her deceased husband. This Court on January 7, 1924, held that the shipment involved was interstate commerce, reversed the judgment of the Supreme Court of Indiana and remanded the case for further proceedings not inconsistent with the opinion (R., 34); *B. & O. S. W. R. R. Co.* v. *Burtch,* 263 U. S. 540.

The cause having been remanded in accordance with the judgment and mandate of this Court to the Circuit Court of Jackson County, the respondent Lula Carroll, as administratrix of Burtch's estate, on or about March 5, 1924, filed an amended complaint in three paragraphs, each praying for damages for the injuries sustained by Burtch in his lifetime and by respondent, his administratrix, for herself and their two children by his death (R., 34). The third paragraph (R., 41-44), which was based on the Federal Employers' Liability Act, is the only one material here.

By various motions and pleadings the Railroad Company raised the question whether the claim for damages because of Burtch's death was barred by the two-year period of limitations prescribed in the Federal

Employers' Liability Act, its contention being that the filing of the amended complaint three years after Burtch's death constituted in reality the institution of a new suit.

The case went to trial and a verdict and judgment were rendered in favor of respondent for $15,000 (R., 102, 112). The judgment was affirmed by the Supreme Court of Indiana on October 2, 1928 (R., 276).

ARGUMENT.

I.

This is a second petition for certiorari in this case. It is submitted that the only question of substance presented is whether the statute of limitations has run so as to prevent recovery by the administratrix of damages for the death of Burtch.

The action for damages for injuries to him was brought by Burtch within four months after the accident by which he was injured. It came to trial and resulted in a judgment in his favor, which was affirmed by the Supreme Court of Indiana. Burtch died February 10, 1921, while the cause was pending in that court. On certiorari this Court reversed and remanded for a new trial, holding that the accident occurred in an interstate shipment and that the Federal Employers' Liability Act applied. When the case was remanded for a new trial the administratrix promptly filed an amended complaint setting up the death of Burtch. The question is whether the statute com-

menced to run at the death of Burtch and barred recovery of damages for his death.

It is submitted that the statute of limitations did not commence to run until the case was remanded to the trial court. The amended complaint could not be filed in the Supreme Court of Indiana nor in this Court. It could not be filed until the case got back in the trial court. *Impotentia excusat legem.* If the judgment of the trial court, affirmed by the Supreme Court of the State, had been affirmed by this Court, or if a petition for a writ of certiorari had been denied, of course there could not be any recovery under the statute of damages for the intervening death of Burtch. As, however, the case went back for a new trial, and as an additional element of damage had occurred while the case was pending in the appellate courts and since the former trial, it was proper to file the amended complaint setting up such additional element of damage, which was promptly done. Damages for injuries and for death "not only may be recovered by the personal representative of the deceased in one action, but *must* be recovered in one action only, if at all" (*No. Pac. Ry. Co.* v. *Maerkl,* 198 Fed. 1, 7).

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single

> wrong but a single recovery for a double wrong" [*St. Louis & Iron Mountain Ry.* v. *Craft,* 237 U. S. 648, 658].

As said by Mr. Justice Holmes in *New York Central R. R. Co.* v. *Kinney,* 260 U. S. 340, 346:

> "When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

II.

Petitioner further claims that suit having been brought for the injuries to Burtch, and judgment having been rendered therefor, recovery could not be had for the subsequent death of Burtch—that that presented a separate cause of action. We submit, however, that there was in this case in reality only one cause of action, that is, the wrongful act or neglect by reason of which Burtch was injured. At the time the suit was brought there was but one element of damage —for the injuries sustained by Burtch. When the case went back for a new trial the same cause of action existed, but an additional element of damage had intervened, in the death of Burtch. As the judgment for the injuries was set aside and a new trial directed, the situation was as though the suit had never been tried. There was no error, therefore, in the court permitting the filing of the amended complaint, and no error in submitting to the jury the two elements of damage. See *Louisville & N. R. Co.* v. *Echols* (S. Ct. Ala),

84 South. Rep. 827, the facts of which were strikingly similar to those in the present case.

III.

It is claimed also that there exists in the case the question of assumption of risk. We submit, however, that even if that question were in the case it is not appropriate for consideration by the Court on a petition for a writ of certiorari. It does not present a federal question. Doubtless if the case were under consideration by this Court on the merits, the question of assumption of risk might be weighed by it along with the other questions presented by the record.

It is submitted that a righteous verdict and judgment, in accordance with the applicable decisions of this Court, have resulted after litigation commenced more than eleven years ago, that no question is presented by the petition, or special and important reasons assigned, which would justify this Court in granting a second writ of certiorari, and that it should be denied.

Respectfully submitted,

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JULY, 1929.

(8214)

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IN THE

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LULA CARROLL, Administratrix of the Estate of GUERNEY O. BURTCH, Deceased,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana.

BRIEF OF RESPONDENT.

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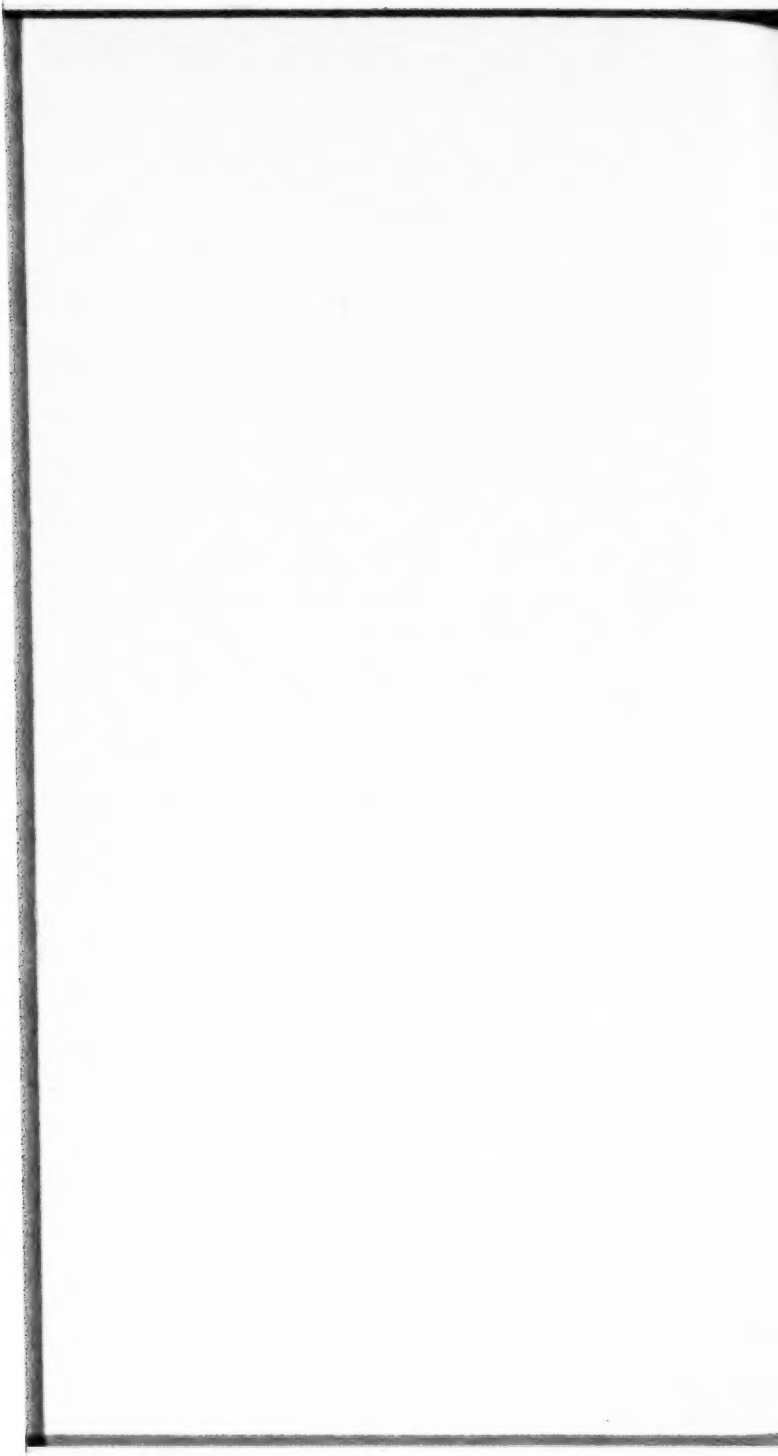

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 87.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Petitioner,

v.

LULA CARROLL, Administratrix of the Estate of GUERNEY O. BURTCH, Deceased,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana.

BRIEF OF RESPONDENT.

STATEMENT OF RELEVANT FACTS.

Guerney O. Burtch was injured by the negligence of petitioner October 24, 1917 (R. 163). His injuries were incurable and fatal (R. 126 and 138).

February 20, 1918, Guerney O. Burtch brought an action in the Jackson Circuit Court for damages resulting from his injuries (R. 1).

The complaint in this action was in two paragraphs, the first of which was based on the Indiana Employers' Liability Act of 1911, Section 1 of which, being Section 9432, Burns' Statutes 1926, reads as follows:

> "Any person, firm or corporation while engaged in business, trade or commerce within this state, and employing in such business, trade or commerce five or more persons, shall be liable and respond in damages to any person suffering injury while in the employ of such person, firm or corporation, or in case of the death of such employe, then to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and if none, then to such employe's parents, and if none, then to the next of kin dependent upon such employe, where such injury or death resulted in whole or in part from the negligence of such employer or his, its or their agents, servants, employes or officers, or by reason of any defect, mismanagement or insufficiency, due to his, its or their carelessness, negligence, fault or omission of duty."

Section 4 of this act, being Section 9435, Burns' Statutes 1926, reads as follows:

> "The damages recoverable under this act shall be commensurate with the injuries sustained, and, in case death results from such injury, the action shall

survive: Provided, that where any such injured person recovers a judgment under the provisions of this act, and an appeal is taken from such judgment, and pending such appeal, the injured person dies and said judgment be thereafter reversed; or where such injured person dies after said judgment is reversed and before trial, the right of action of such person shall survive to his or her personal representative, and such action may be continued in the name of such personal representative for the benefit of the person entitled under this act to receive the same."

The second paragraph of this complaint was based on a common-law liability for negligence, as shown in the former opinion of this Court. Section 293, Burns' Statutes 1926, providing for the survival of a claim for personal injuries, applicable to this paragraph of complaint, reads as follows:

"Whoever has a claim for personal injuries and obtains judgment for the same against any person, company or corporation in any trial court of this state, and from which judgment any person, company or corporation against whom or which the same was obtained, shall appeal to the Supreme or Appellate Court of this state, and such judgment be reversed by such Supreme or Appellate Court, and a new trial be granted to appellant thereon; and if the person who obtained such judgment should die pending such appeal, or before a new trial after such reversal can be had, such claim for personal injuries shall survive and may be prosecuted by the representative of such dece-

dent as other claims are prosecuted for and on behalf of decedents' estates."

A trial was had on this complaint in the Jackson Circuit Court on May 27 and 28, 1918, and a verdict of $8,000.00 returned for plaintiff (R. 13 and 14).

October 23, 1918, a new trial was denied and judgment rendered on the verdict and an appeal to the Supreme Court of Indiana taken (R. 29 and 30).

March 14, 1922, this judgment was affirmed by the Supreme Court of Indiana (R. 33) (Baltimore etc. Ry. Co. v. Burtch, 192 Ind. 199).

This cause was transferred from the Indiana Supreme Court to the Supreme Court of the United States and reversed and remanded (Baltimore etc. R. Co. v. Burtch, 263 U. S. 540).

February 29, 1924, the Supreme Court of Indiana, in pursuance of the mandate of the Supreme Court of the United States, reversed the judgment and remanded the cause to the Jackson Circuit Court (R. 34).

February 10, 1921, while the appeal in this cause was pending, Guerney O. Burtch died as a result of his injuries, and his widow, Lula Burtch, was by the Jennings Circuit Court appointed and qualified as administratrix of his estate (R. 231, 232). By order of the Court Lula Burtch, as administratrix, was substituted for Guerney O. Burtch, as respondent in the case. December 25, 1923, Lula Burtch was married to a Mr. Carroll (R. 235).

March 5, 1924, immediately after the return of the cause to the Jackson Circuit Court and the granting of a new trial in pursuance of the mandate of the Supreme Court, Lula Carroll, as administratrix of the estate of Guerney O. Burtch, deceased, with leave of Court, filed an amended complaint in three paragraphs (R. 34). The first and second paragraphs of the amended complaint were substantially the same as in the original complaint, with the allegation of additional facts showing the death of the plaintiff, Guerney O. Burtch, pending the appeal, and the survival of the cause of action stated in the first paragraph, and the survival of the claim for personal injuries alleged in the second paragraph. The third paragraph of the amended complaint averred the same acts of negligence as those stated in the other paragraphs, with the additional allegation that plaintiff and defendant were engaged in interstate commerce at the time the injuries were suffered, and also averred the death of Guerney O. Burtch as the result of his injuries, and asks damages not only for personal injuries suffered by him, but also damages resulting from his wrongful death (R. 34 to 44).

Petitioner, for second paragraph of answer, alleged that the cause of action did not accrue within two years, and for third paragraph of answer alleged that so much of plaintiff's cause of action as was based on said death did not accrue within two years next before the commencement of the action (R. 56, 57). These answers were denied (R. 58).

This cause, on change of venue, was sent to the Jennings Circuit Court and there tried by jury March 16 to 19, 1925 (R. 69, 76, 96). The Court, in writing, instructed the jury to disregard the first paragraph of complaint, in the light of the evidence (R. 99, 91).

A verdict of $15,000.00 in favor of plaintiff was returned (R. 102), and judgment thereon rendered March 21, 1925 (R. 112).

A new trial was denied June 1, 1925, and an appeal to the Supreme Court of Indiana taken (R. 118).

The Supreme Court of Indiana affirmed this judgment October 2, 1928 (R. 276). The opinion of that Court affirming the judgment appears in the record at pages 277 to 287.

This Court granted petitioner's application for a writ of certiorari, with this limitation: "That counsel shall confine themselves in the briefs and in all arguments to the question whether this suit is barred by the Statute of Limitations."

POINTS AND AUTHORITIES.

I.

Third Paragraph of Amended Complaint.

(a) The original complaint, in two paragraphs, was timely filed, and, under the law of Indiana, the forum in which this cause was tried, the filing of respondent's third paragraph of amended complaint, founded on the same transaction as that mentioned in the original complaint, but declaring on the Federal Employers' Liability Act instead of the Indiana Employers' Liability Act, did not introduce a new cause of action, and the paragraph so filed was not barred by the two years limitation.

Chicago etc. Ry. Co. v. Dinius, 180 Ind. 596;
Oolitic Stone Company v. Ridge, 174 Ind. 558;
Terre Haute etc. Ry. Co. v. Zehner, 166 Ind. 149;
Cleveland etc. Ry. Co. v. Bergschicker, 162 Ind. 108.

(b) This Court also has expressly held that an amendment to a complaint by a railroad employe asking damages for personal injuries, by alleging that the parties were engaged in interstate commerce, does not introduce a new cause of action, and hence may be made, although the limitation period has expired.

New York etc. R. Co. v. Kinney, 260 U. S. 340;
St. Louis etc. R. Co. v. Smith, 243 U. S. 630;
Missouri etc. R. Co. v. Wulf, 226 U. S. 570;

Smith v. Atlantic etc. R. Co., 210 Fed. 761, 127 C. C. A. 311;
De Valle Da Costa v. Southern Pac. R. Co., 176 Fed. 843, 100 C. C. A. 313, 217 U. S. 606.

(c) This is the uniform holding of the courts of last resort in a number of the states.

Alabama etc. Co. v. Heald, 154 Ala. 580;
Wilson v. Denver etc. R. Co., ... Col. ..., 187 Pac. 1027;
Gainsville etc. R. Co. v. Vandiver, 141 Ga. 350;
Bashan v. Chicago etc. R. Co., 178 Ga. 998;
Cincinnati etc. R. Co. v. Goode, 163 Ky. 60;
Lanis v. Illinois etc. R. Co., 140 La. 1;
Jorgensen v. Grand Rapids etc. R. Co., 189 Mich. 537;
Broom v. Southern R. Co., 195 Miss. 493;
Nashville etc. R. Co. v. Anderson, 134 Tenn. 666;
Fort Worth Belt R. Co. v. Jones, ... Tex. Civ. App. ..., 182 S. W. 1184;
Curtice v. Chicago etc. R. Co., 162 Wis. 421, 166 Wis. 594, 247 U. S. 510.

II.

Second Paragraph of Amended Complaint.

The Statute of Limitations has no application to the second paragraph of amended complaint, since it was timely filed, and seeks a recovery not for death, but only upon a claim for personal injuries suffered by Guerney O. Burtch, and reduced to judgment in his lifetime, and

caused to survive his death by virtue of Section 293, Burns' Statutes 1926, without regard to the cause of his death.

Section 293, Burns' Statutes 1926;
Cincinnati etc. R. Co. v. McCullom, 183 Ind. 556;
Harmon v. Brown, 183 Ind. 535;
Murray v. Omaha Transfer Co., 95 Neb. 175, 98 Neb. 482.

III.

One Cause of Action Stated in Third Paragraph of Amended Complaint.

(1) The liability created by Section 1 of the Federal Employers' Liability Act is for both injury and death resulting from certain specified negligence. This liability is readily distinguishable from that given for death by statutes patterned after Lord Campbell's Act. Such statutes merely modify the common law to the extent that an action is given to specified beneficiaries for a death which is the result of any wrongful act. The federal act creates a right of action, which did not exist before, for injuries resulting in whole or in part from certain specified negligence and authorizes a recovery of damages resulting both from personal injuries and death.

U. S. Code 1928, Title 45, Section 51.

(2) The Federal Employers' Liability Act is exclusive in its field, and, by amendment, was intended to grant all the relief afforded by the statutes of any of the states under

like circumstances. Death and survival acts, in a number of states, authorized recovery of damages resulting to an injured employe, and also resulting to his widow and children from his death because of the negligent or wrongful act of his employer.

Larue v. C. G. Kershaw Constr. Co., 177 Ala. 441;
Kling v. Torello, 87 Conn. 301;
Bartley v. Boston etc. Ry. Co., 198 Mass. 163;
Mobile etc. R. Co. v. Hicks, 91 Miss. 273;
Davidson Benedict Co. v. Swerson, 109 Tenn. 572.

(3) The amendment of April 5, 1910, provides that "any right" or the entire right of action, so given, not for personal injuries only, nor for death only, but for both, shall survive; but, that there shall be only one recovery.

U. S. Code 1928, Title 45, Section 59.

(4) The cause of action in this case is not barred, since suit was timely brought; but the effect of the amendment to the federal statute is to permit and require all damages, both to decedent in his lifetime, by reason of the injury, and to his widow and children, by reason of his death, to be merged upon his death and to be recovered in one action for the benefit of his widow and children.

St. Louis etc. R. Co. v. Craft, 237 U. S. 648;
Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144;
Kansas City etc. R. Co. v. Leslie, 238 U. S. 599;

Moffett v. Baltimore etc. R. Co., 220 Fed. 39, 135 C. C. A. 607;
Northern Pac. R. Co. v. Maerkl, 198 Fed. 263, 117 C. C. A. 237;
Illinois C. R. Co. v. O'Neill, 177 Fed. 328, 100 C. C. A. 658, 217 U. S. 604.

(5) The decision of this Court in the case of St. Louis etc. R. Co. v. Craft, supra, awarding damages both for personal injuries and death in the same action, under the amended Federal Employers' Act, has become the law of the land and has been followed in the following cases:

Birmingham etc. R. Co. v. Hendrix, ... Ala. ..., 110 So. 312;
St. Louis etc. R. Co. v. Conarty, 106 Ark. 421;
Baltimore etc. R. Co. v. Carroll, 200 Ind. ..., 163 N. E. 99;
Jorgensen v. Grand Rapids etc. R. Co., 189 Mich. 537, 543;
Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144;
Brooks v. Yazoo etc. R. Co., 111 Miss. 793;
Kilburn v. Chicago M. & St. P. R. Co., 289 Mo. 75;
Chicago R. I. & P. R. Co. v. Fontron, 89 Okla. 87;
Atchison etc. R. Co. v. Hix, ... Tex. Civ. App. ..., 291 S. W. 281;
Calhoun v. Great Northern R. Co., 162 Wis. 264;
Goodyear v. Davis, 114 Kans. 557, 39 A. L. R. 563;
Thornhill v. Davis, 121 S. C. 49, 24 A. L. R. 617;
St. Louis etc. Ry. Co. v. Pearson, 170 Ark. 842, certiorari denied.

ARGUMENT.

Guerney O. Burtch, on October 24, 1917, suffered injuries for which this action was brought. The action was commenced February 20, 1918. It is urged that because of the amendment of the complaint, after two years from the date of injury, the cause of action is barred. This contention is not tenable under any applicable law. In the case of Chicago etc. R. Co. v. Dinius, 180 Ind. 596, 616, the Court said:

> "As a final objection to the complaint it is alleged that the complaint is an amended complaint filed more than two years after the accident, that it introduces a new cause of action and a different one from that stated in the original complaint, upon which the cause was first tried. This being true, it is contended the complaint showed on its face that the cause of action set up was barred by the two years Statute of Limitations, and was, therefore, subject to demurrer for want of facts. The objection is without merit and wholly unsustained by our decisions * * *. The case before us clearly comes within the rule that where an amendment to a complaint sets up no new matter or claim, but merely amplifies and restates with more certainty, or in a different form, the cause of action set out in the original pleading, it relates back to the commencement of the suit, and the Statute of Limitations is arrested at that point."

The case of Oolitic Stone Company v. Ridge, 174 Ind. 558, was originally based on the Indiana Employers' Lia-

bility Act, and after a judgment for the plaintiff and an appeal, and reversal of the judgment, and after the lapse of more than two years, the complaint was so amended as to seek a recovery for negligence at common law. It was urged that the cause of action stated in the amended compaint was barred, but the Court denied this contention, saying:

> "Both the former and the present complaint involve the same transaction and injury. The gravamen of the action, as disclosed by both complaints, is the personal injury sustained by appellee, due to the fact that he was, by appellant, ordered outside of his employment to work in an unsafe and dangerous place, without any warning with respect to that fact, and by reason thereof suffered the injuries of which he complains * * *. The amendment cannot be said to have deprived the appellant of any defense which he had as against the action stated in the original complaint. The same evidence would support both the original and the amended complaint. For the reasons herein stated the amended complaint must be held to relate back to the time when the action was originally commenced; hence there is no room for interposing the Statute of Limitation in bar of this suit."

These cases make clear the right to amend the complaint, as was done in this case, under the law of Indiana, without subjecting the pleading to the bar of the Statute of Limitations.

In the case of Moffett v. Baltimore etc. R. Co., 220 Fed. 39, a railroad employe was killed on December 27, 1910,

and the complaint was amended in a material matter on January 28, 1913, and the right so to do was not even questioned.

In the case of Smith v. Atlantic Coast Line R. Co., 210 Fed. 761, the official syllabus reads as follows:

> "Where the complaint in an action by an employe for a personal injury, commenced within two years after the injury occurred, alleged the facts and stated a cause of action of which the Court had jurisdiction, an amendment, made after the expiration of such two years, alleging that defendant was engaged in interstate commerce, and that plaintiff was employed in such commerce at the time of his injuries, so as to bring the case within Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), does not introduce a new cause of action, but only affects the defenses which may be made, and the action is not barred by the two years limitation contained in section 6 of the act."

In the case of Missouri etc. R. Co. v. Wulf, 226 U. S. 570, 576, this Court said in reference to amendment:

> "Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather than in substance (Stewart v. Baltimore & Ohio Railroad Co., 168 U. S. 445). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and, therefore, it related back to the beginning of the suit."

The case of New York etc. R. Co. v. Kinney, 260 U. S. 340, conclusively settles the right of the respondent to make the amendment of which complaint is made in this case. That case had been tried three times, and seven and one-half years had run since it was commenced, when an amendment was made bringing it within the federal act, and upon that point this Court pertinently said:

> "Where a complaint in an action for personal injuries alleges facts which may constitute the wrong either under the state law or the Federal Employers' Liability Act, according to the nature of the employment, an amendment alleging that the parties at the time of the injury were engaged in interstate commerce does not introduce a new cause of action, and may be allowed after the two-year limitation prescribed by section 6 of the act has run."

And the Court, by Mr. Justice Holmes, further said:

> "When the defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specific conduct, the reasons for the Statute of Limitations do not exist and we are of opinion that a liberal rule should be applied."

These decisions conclusively settle the right of the respondent in this case to be substituted as plaintiff, and to make the amendments shown, and that no part of the action declared upon is barred by the Statute of Limitations.

The principle so declared is no new or strange doctrine, but is in accord with the holdings of the highest courts in many of the states, as shown by citations under point I (c) of this brief.

No contention is made by the petitioner, or could be plausibly made, that the cause of action set up in the second paragraph of amended complaint is barred. The claim for damages because of personal injuries sustained by Guerney O. Burtch is the same in the amended complaint as in the original complaint. The only change made is the allegation of additional facts, showing the death of Burtch after a judgment in his favor, and pending an appeal therefrom, so as to bring the case within the survival provisions of Section 293, Burns' Statutes 1926. In the case of Cincinnati etc. R. Co. v. McCullom, 183 Ind. 556, 569, this statute was held to be constitutional and its purpose and meaning construed as follows:

> "The latter statute provides for the survival of the cause of action which existed in the deceased person prior to his death. The action which the personal representative is permitted to prosecute is not one created by statute for the exclusive benefit of those who suffer loss by death, but is a cause of action which comes to the representative by survival, and the recovery, if any, inures to the benefit of the estate. The cause of action is based upon the wrong inflicted upon the person of the decedent, and the amount of recovery is measured from the standpoint of the decedent and not from that of any fixed beneficiaries."

In so far as the judgment in this case rests, if at all, upon this paragraph of complaint, it should be affirmed without question.

The real conflict in this case is waged against so much of the third paragraph of amended complaint as seeks a recovery of damages resulting from the death of Guerney O. Burtch. Mr. Burtch lived three years after he was hurt, and his death, as a result of his injuries, occurred three years before the amended complaint was filed. A separate action for his wrongful death, if allowable, would have been barred at the time of his decease. The action for personal injuries brought by him was pending on appeal in the Supreme Court of Indiana, and in this court, for three years after his death, so that the complaint could not have been amended or supplemented during that time. The complaint was so amended as to show his death at the earliest opportunity afforded. It follows that if a recovery for his death, as an element of damages, cannot be had under this amended complaint, then the law by its own processes has defeated its manifest ends and purposes and denied full justice. We do not believe that the law is subject to such reproach.

In the case of American R. Co. v. Didricksen, 227 U. S. 145, this Court held that under the Federal Employers' Liability Act, before the amendment of 1910, a cause of action created in favor of the injured employe would not survive his death, or pass to his representatives; but, that the act, in case of the death of such an employe from his

injury, created a new a distinct right of action for the benefit of the dependent relatives named in the statutes. The amendment was manifestly designed to remedy this injustice.

The State of Connecticut had a survival statute in force prior to the amendment of 1910 to the Federal Employers' Liability Act, and the Supreme Court of Errors of that state, in the case of Kling v. Torello, 87 Conn. 301, held that a recovery could be had both for the damages suffered by the employe in his lifetime and also for the damages resulting from his death on account of the injury sustained. We quote from the Connecticut case the following:

> "The situation is very different in this state. The right of recovery for the death which our statute gives is not one which is independent of or unrelated to the right of action which was in the deceased at his death. Our statute is framed upon an entirely different theory and effectuates quite a different policy (Goodsell v. Hartford & N. H. R. Co., supra). The right of action which the executor or administrator is permitted to pursue is not one which springs from the death. It is one which comes to the representative by survival. The right of recovery for the death is as for one of the consequences of the wrong inflicted upon the decedent. The amount of recovery is determined from the standpoint of the deceased, and not from that of the statutory beneficiaries. Its measure, within the statutory limitation, is the value of life to him whose life has been cut off (Broughel v. Southern New England Teleph. Co., 73 Conn. 614, 620, 84 Am. St. Rep. 176, 48 Atl. 751). When one, as the result of injuries inflicted, suffers during life, and death later results,

there are not two independent rights of action. There is but one liability, and that is for all the consequences of the wrongful act, including the death (Broughel v. Southern New England Teleph. Co., 73 Conn. 614, 617, 84 Am. St. Rep. 176, 48 Atl. 751). There cannot be two recoveries (Goodsell v. Hartford & N. H. R. Co., supra; McElligott v. Randolph, 61 Conn. 157, 159, 29 Am. St. Rep. 181, 22 Atl. 1094). If the injured man survives to recover he recovers once for all; if he dies before recovery his executor or administrator stands in his place. The survival statute operates to transfer to the representative the right of action which the deceased had for his sufferings and disability during life, while the death enlarges his right of recovery by permitting an award of additional damages for the death itself as one of the harmful results of the wrongful act. The Court is, by the statute, as it was not by the common law, authorized to take that event into consideration, as it might any other physical development consequent upon the injuries, whether occurring before or after action brought. The new event is not regarded as one which creates a cause of action, but one which has a bearing upon the award of damages. Instantaneous death may of itself bring into existence a right of action which is confined, in the matter of recovery, to the event of death (Murphy v. New York & N. H. R. Co., 30 Conn. 184, 188). But if the death is not instantaneous the right of action is not so confined. It reaches back to the antecedent harmful results, and the death is, by force of the statute, made one of the incidents, in the story of results, which is material in a determination of the amount of recovery to which the representative is entitled (Broughel v. Southern New England Teleph. Co., supra)."

The Supreme Court of Tennessee in the case of Davidson Benedict Co. v. Swerson, 109 Tenn. 572, 614, announced a like holding from which we quote as follows:

> "It is apparent from the authorities that there are, under the sections of the Code referred to, and the Act of 1803, two classes of damages recoverable in the same action: First, damages purely for the injury to the deceased himself; second, the incidental damages suffered by his widow and children, or next of kin, from his death."

In the case of Dougherty v. New Orleans R. & Light Co., 133 La. 993, the Court held, under a survival statute of that state, that on the death of the injured person his right of action to recover damages for personal injuries survived for the benefit of the beneficiaries designated, and a right of action accrued in favor of the beneficiaries designated, to recover compensation for the pecuniary injuries sustained by them for the death.

In the case of Larue v. C. G. Kershaw Contracting Co., 177 Ala. 441, the Supreme Court of that state, construing the provisions of the Tennessee Code, held that those statutes create no new and independent cause of action, but merely continue a cause of action which accrued to the injured person, so that it does not abate by his death, but survives to his widow, children or personal representative; and that the cause of action was not the death of the person injured, but the breach of duty that caused the injury, and, if death results, this is but an aggravation of the injury.

It is a familiar principle of law that when doubt arises as to the proper construction of a statute, and the purpose and intent of the Legislature or Congress, courts will look to contemporaneous history for the evils sought to be remedied, and the conditions that probably led up to and induced the enactment.

This Court recognized and, in substance, declared that principle in the case of St. Louis etc. R. Co. v. Craft, 237 U. S. 648, in connection with the interpretation of the amendment to the Federal Employers' Liability Act, wherein it is said:

> "The original act, as we have said, made no provision for the survival of the right of action given to the injured person, although such a provision existed in the statutes of many of the states. Shortly after the act two cases arose thereunder, in each of which the personal representative of an injured employe, who died from his injuries, sought to recover damages for the employe's personal loss and suffering while he lived, as well as for the pecuniary loss to the beneficiaries named in the act. In both cases—one in the Circuit Court for the Western District of Arkansas and the other in the Circuit Court for the District of Massachusetts—the right of the injured employe would have survived if the local statutes were applicable, and the ruling in both was that the Federal Act was exclusive and superseded the local statutes, that it made no provision for a survival, and, therefore, that the recovery should be confined to damages for the pecuniary loss resulting to the designated beneficiaries from the death (Fulgham v. Midland Valley R. Co.,

167 Fed. 660; Walsh v. New York, N. H. & H. R. Co., 173 Fed. 494). Following these decisions the amendment embodying the new section was proposed in Congress. In reporting upon it the Committees on the Judiciary in the Senate and House of Representatives referred at length to the opinions delivered in the two cases, to the absence from the original act of a provision for a survival of the employe's right of action, and to the presence of such a provision in the statutes of many of the states, and then recommended the adoption of the amendment, saying that the act should be made 'as broad, as comprehensive and as inclusive in its terms as any of the similar remedial statutes existing in any of the states, which are suspended in their operation by force of the federal legislation upon the subject' (Senate Report No. 432, 61st Cong. [2nd Sess.], pp. 12-15; House Report No. 513, 61st Cong. [2d Sess.], pp. 3-6). While these reports cannot be taken as giving to the new sections a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted."

The action in the case last above mentioned was brought after the death of the injured employe, by an administrator, to recover damages both for injuries to and the death of his intestate. The plaintiff was awarded damages on both claims, and the judgment was affirmed by this Court, and from the opinion in that case we quote the following:

"No change (by the amendment) was made in section 1 (of the Act of 1908). * * * It continues, as

before, to provide for two distinct rights of action; one in the injured person for his personal loss and suffering, where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representatives 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and section 1 are read together, the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful

act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

In the case of Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 147, this Court quoted with approval from the Craft case as follows:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

In the case of Kansas etc. R. Co. v. Leslie, 238 U. S. 599, this Court, referring to an instruction given by the trial court, said:

> "It is said that the court below erred in approving the charge permitting recovery for pecuniary loss to the widow and child, and also for conscious pain and

suffering by the deceased * * * between the injury and death. This charge was sustained in St. Louis etc. R. Co. v. Craft, 237 U. S. 648."

In the case of Northern Pac. Ry. Co. v. Maerkl, 198 Fed. 1, an injured railroad employe brought suit and afterwards died of his injuries, and his widow was appointed as administratrix of his estate and as such filed a supplemental complaint seeking a recovery for both personal injuries and death. The verdict allowed $936.80 for personal injuries and $8,640.00 for death damages. This judgment was affirmed. The Court in part said:

"We are of the opinion that the plain meaning of these statutory provisions is that when one receives an injury in the employment of a railroad company under such circumstances as entitles him or her, as the case may be, by virtue of the statute to recover from the company, damages therefor, and if such injury results in the death of the injured, damages resulting from the personal suffering and from such death, not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all, for the benefit of those specified in the statute."

This case was later cited with approval by the Supreme Court of the United States.

In the case of Illinois C. R. Co. v. O'Neill, 100 C. C. A. 658, 177 Fed. 328, a writ of certiorari was denied by this Court, although an instruction authorized a recovery for

both personal injuries sustained by the deceased and also loss of support by the widow and children.

217 U. S. 604.

In the case of St. Louis etc. R. Co. v. Pearson, 170 Ark. 842, a recovery was approved for pecuniary loss to the widow and children and also for conscious suffering endured during life by the deceased employe, and it was announced that such recovery could be had in one suit under the Federal Employers' Liability Act and a writ of certiorari to that court was denied by this Court.

A similar construction of the amended Federal Employers' Liability Act, and like holding thereunder, have been made by the highest courts in many of the states, in accordance with the decision of this Court in the Craft case, among which we cite the following:

Birmingham etc. R. Co. v. Hendrix, ... Ala. ..., 110 So. 312;
St. Louis etc. R. Co. v. Conarty, 106 Ark. 421;
Baltimore etc. R. Co. v. Carroll, 200 Ind. ..., 163 N. E. 99;
Jorgensen v. Grand Rapids etc. R. Co., 189 Mich. 537, 543;
Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144;
Brooks v. Yazoo etc. R. Co., 111 Miss. 793;
Kilburn v. Chicago M. & St. P. R. Co., 289 Mo. 75;
Chicago R. I. & P. R. Co. v. Fontron, 89 Okla. 87;
Atchison etc. R. Co. v. Hix, ... Tex. Civ. App. ..., 291 S. W. 281;

Calhoun v. Great Northern R. Co., 162 Wis. 264;
Goodyear v. Davis, 114 Kans. 557, 39 A. L. R. 563;
Thornhill v. Davis, 121 S. C. 49, 24 A. L. R. 617.

These cases, we believe, make entirely clear the interpretation put upon the Federal Employers' Liability Act, after its amendment in 1910, and sustain the ruling of the trial court in this case.

In the light of these authorities construing and applying the amended Employers' Liability Act we submit that the death of Guerney O. Burtch did not give rise to a new and different cause of action than that stated in the pending suit, but merely presented a changed state of facts, material and proper for consideration in determining the amount of damages to be awarded, and that respondent's cause of action is not barred, and that the judgment herein should be in all things affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 87.—October Term, 1929.

The Baltimore and Ohio Southwestern Railroad Company, Petitioner, *vs.* Lula Carroll, Administratrix of the Estate of Guerney O. Burtch, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Indiana.

[February 24, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

The deceased, Guerney O. Burtch, sustained personal injuries while assisting to unload a heavy ensilage cutter from a freight train operated by petitioner. He sued in a state court, and recovered damages on the theory that state law, and not the Federal Employers' Liability Act, applied. This court reversed the judgment, holding that the federal act applied, and remanded the cause for a new trial. On February 10, 1921, while the appeal was pending in the state supreme court, Burtch died, and his widow (now Lula Carroll) was appointed administratrix. Upon her application she was substituted as respondent in this court. *B. & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540.

Three years after the death of Burtch when the case was back in the state court of first instance, respondent, by leave of that court, amended the complaint, and, among other things, alleged for the first time the death of Burtch as a result of the injury, and demanded judgment in a single sum for the loss and injury sustained by the deceased during his lifetime and the pecuniary loss resulting from his death. A motion to require respondent to state these claims as separate causes of action was overruled. The answer affirmatively alleged that in so far as the amended complaint was based upon the death of Burtch, the cause of action was barred because not brought within two years, as required by § 6 of the act (U. S. Code, Title 45, § 56), which provides that no action shall be maintained under the act unless commenced within two years

from the day the cause of action accrued. The jury returned a verdict for respondent and the judgment thereon was affirmed by the state supreme court. — Ind.—.

In respect of the statute of limitations, that court held that the challenged amendment did not introduce a new cause of action, but was a mere amplification of the original complaint and related back to the commencement of the action. In support of the ruling, reliance was had upon the decisions of this court that neither an amendment for the first time setting up the right of the plaintiff to sue as personal representative, *Mo., Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570, nor an amendment for the first time alleging that the parties were engaged in interstate commerce, *N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340, introduces a new cause of action. Each of these decisions proceeds upon the ground that the amendment did not set up any different state of facts as the ground of action, and therefore it related back to the beginning of the action. In the *Kinney* case it was pointed out that the original declaration was consistent with a wrong under either state or federal law, as the facts might turn out; and that the acts constituting the tort were the same, whichever law gave them that effect.

But here two distinct causes of action are involved, one for the loss and suffering of the injured person while he lived, and another for the pecuniary loss to the beneficiaries named in the act as a result of his death. *St. Louis & Iron Mtn. Ry.* v. *Craft*, 237 U. S. 648, 658; *C., B. & Q. R. R.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, 162. In the *Craft* case it was said: "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. . . . One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong." And in the *Wells-Dickey* case it was explicitly held that for an injury resulting in death the act gives two distinct causes of action.

The statute, it is true, provides that "there shall be only one recovery for the same injury"; but this has the effect not of merging the two rights into a single cause of action, but of limiting the personal representative "to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action." *St. Louis & Iron Mtn. Ry.* v. *Craft, supra*, p. 659.

The cause of action which arises from death accrues at the time of death, and the two-year period of limitation then begins. *Reading Co.* v. *Koons,* 271 U. S. 58. Here, more than two years having passed, the amendment, introducing as it did a new and distinct cause of action, does not relate back to the beginning of the action so as to avoid the bar of the statute of limitations, *Union Pacific Railway* v. *Wyler,* 158 U. S. 285, 296-298; and since the verdict of the jury was for a single sum, including an undetermined amount as damages for the death, the judgment must be reversed and the cause remanded for a new trial only upon the alleged cause of action for the personal injuries suffered by the deceased.

The court below gave weight to the fact that this court, in disposing of the former appeal, remanded the cause for a new trial, and suggests that this would not have been done if the complaint was not subject to amendment so as to allow a submission of the case to a jury under the federal act. It is enough to say that on the former appeal the right to maintain an action on account of Burtch's death was in no way involved; and there is no warrant for assuming that this court had in mind any future proceedings in respect thereof.

We do not stop to discuss the complaint, rather faintly urged, that the trial court gave conflicting and improper instructions to the jury on the subject of assumption of risk. That question received the consideration of this court in *Texas & Pacific Railway* v. *Archibald,* 170 U. S. 665, 671, and *Choctaw, Oklahoma &c., R. R. Co.* v. *McDade,* 191 U. S. 64, 68, and the rule to be followed in any subsequent trial of this case will there be found fully and carefully stated. Under the rule established by these cases, some of the instructions of the court were over favorable to the railroad company rather than the reverse. On the other hand, the charge in respect of the duty of the employer to furnish safe appliances was without qualification, and the jury might well have understood that the duty was an absolute one. That is not the law. The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 502; *Yazoo & M. V. R. R. Co.* v. *Mullins,* 249 U. S. 531, 533.

Judgment reversed.